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No. 04-854

IN THE

Supreme Court of the United States

WILLIAM ETHRIDGE HILL, JR.,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

During five hours of intense interrogation, law enforcement authorities violated petitioner's *Miranda* rights by extracting petitioner's oral statement from him without ever advising him that anything he said could be used against him in a court of law. Immediately after petitioner gave that statement, he was asked to and did sign a written version of it. The oral statement was excluded from evidence, but the written statement was admitted because it included written *Miranda* warnings that petitioner read before signing.

The question presented is whether the admission of petitioner's written statement is consistent with either this Court's intervening decision in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004)—issued after the Texas Court of Appeals decided this case but before the decision became final on direct review—or this Court's earlier decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985).

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William Ethridge Hill, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals in this case.

OPINIONS BELOW

The unreported opinion of the Texas Court of Appeals for the Third Judicial District, *William Ethridge Hill, Jr.* v. *State*, Nos. 03-01-00232-CR, 03-01-00233-CR (filed November 6, 2003) (avail. 2003 WL 22508201), is reproduced at App., *infra*, 1a-7a. The unreported opinion of the Texas Court of Criminal Appeals, Nos. 2220-02, 2221-02 (filed June 11, 2003) (avail. 2003 WL 21354693), is reproduced at App., *infra*, 8a-9a. The unreported opinion of the Texas Court of Appeals for the Third Judicial District, *William Ethridge Hill, Jr.* v. *State*, Nos. 03-01-00232-CR, 03-01-

00233-CR (filed December 5, 2002), is reproduced at App., *infra*, 10a-27a. The unreported opinion of the Texas Court of Appeals for the Third Judicial District, *William Ethridge Hill, Jr.* v. *State*, Nos. 03-01-00232-CR, 03-01-00233-CR (filed August 30, 2002) (avail. 2002 WL 1997915), is reproduced at App., *infra*, 28a-42a. A transcript of the findings of fact and conclusions of law of the 331st Judicial District Court of Travis County, Texas, is reproduced at App., *infra*, 43a-47a. The unpublished notices of the Texas Court of Criminal Appeals denying consolidated petitions for discretionary review are reproduced at App., *infra*, 48a-49a.

JURISDICTION

The Texas Court of Criminal Appeals denied William Ethridge Hill, Jr.'s consolidated petitions for discretionary review on September 22, 2004. Jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner William Ethridge Hill, Jr. ("Hill") was convicted in the Judicial District Court of Travis County, Texas, of murder and arson, and sentenced to 22 years of

imprisonment. App., *infra*, 8a. The conviction was based largely on Hill's written statement that, the day the fire broke out, he had been involved in an altercation with the victim at the victim's residence.[1] That written statement was generated during five hours of custodial interrogation that occurred without appropriate *Miranda* warnings. The statement, however, was admitted into evidence because it contained written *Miranda* warnings which Hill read before he signed it. *Id.* at 44a-45a. The Texas Court of Appeals for the Third Judicial District affirmed the conviction, *id.* at 1a-7a, 10a-27a, and Hill sought discretionary review in the Texas Court of Appeals. While that petition was pending, this Court decided *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004). The Texas Court of Criminal Appeals denied discretionary review. See App., *infra*, 48a-49a.

1. In the early morning hours of October 2, 1997, the Austin Fire Department responded to a report of a fire at the residence of William Allen ("Allen"). App., *infra*, at 11a. Allen's body was discovered at the scene. *Ibid.* A medical examiner determined that Allen, while intoxicated, had suffered a non-fatal blow to his face which rendered him unconscious. 4 Trial Tr. 30-31, 151-153. The medical examiner concluded that Allen died of smoke inhalation. App., *infra*, 11a. Initially, the state's fire investigator listed the fire's cause as "undetermined." 2 Trial Tr. 132-133.

Detective Mark Gilchrest ("Gilchrest") of the Austin Police Department was assigned to investigate. Gilchrest discovered that Hill, Allen's former roommate, had recently moved out of the house after forging several of Allen's checks. One of Allen's neighbors told the police that, shortly before the reported fire, he saw a person matching Hill's description get out of a car parked down the street from Allen's house. Gilchrest also met with some of Hill's

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[1] There was no physical evidence connecting Hill to the alleged crime scene.

acquaintances and learned that Hill had left Austin on the day of the fire to visit his elderly mother in the Washington, D.C., area. App., *infra*, 11a-12a.

On October 10, 1997, Gilchrest telephoned Hill at his mother's house in Maryland. App., *infra*, 12a. Gilchrest stated that, although the investigation was focused on an accidental death, he needed to talk to Hill about his relationship with Allen. 5/16/00 Hr'g Tr. 152. Around the same time, Gilchrest assisted another Austin Police Department detective in an unrelated credit card abuse investigation against Hill. Gilchrest thereafter submitted information to the Travis County District Attorney's Office, which secured an indictment against Hill on credit card abuse charges. *Id.* at 164-166. Gilchrest planned to use the credit card abuse charge as "a way to get [Hill] back or at least hold him in Maryland long enough for us to be able to talk to him." *Id.* at 168. Gilchrest also drafted a probable cause affidavit for Hill's arrest for murder and a search warrant affidavit to obtain a sample of Hill's blood. 5/16/00 Hr'g Tr. 168.[2] Armed with those documents, Gilchrest traveled to Maryland on October 28, 1997. *Id.* at 149-150; 155-157.

After arriving in Maryland, Gilchrest discovered that Hill was visiting his sister in New York. Under the guise of needing to wrap things up to comply with a prosecutor's deadline (but without alerting Hill that he was already in

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[2] The probable cause affidavit for a warrant for a sample of Hill's blood was obtained as a result of the discovery of blood in Allen's truck. 5/16/00 Hr'g Tr. 149-150. Hill's blood, it turns out, did *not* match the blood found in the truck. *Id.* at 160. The presence of blood in the truck, in any event, would have been consistent with Hill's later statement that, following his altercation with Allen, he took Allen's truck keys from the floor by the front door of Allen's house and moved the truck down the street so that Allen (who was drunk) would not try to get into the truck and drive. 9 Tr. State Exh. 30 at 3.

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Maryland), Gilchrest convinced Hill to travel to Maryland the next day to be interviewed. 5/16/00 Hr'g Tr. 169-170, 174. On October 29, 1997, FBI Agent Ed Roach ("Roach") and two Maryland state police officers picked up Hill at his mother's house. App., *infra*, 12a. Gilchrest hid in a car parked down the street to avoid alerting Hill to his presence. 5/16/00 Hr'g Tr. 14-15. Gilchrest told the Maryland officers not to inform Hill of the warrant for his arrest. *Id.* at 12, 169. Under Gilchrest's instructions, Hill was to be arrested only if he refused to accompany them to the police station for a "voluntary" interview. *Id.* at 12, 13, 49, 94, 96-97, 173. The Maryland officers were likewise told that, if Hill attempted to leave the police station or terminate the interview after arriving there, they were to arrest him. *Id.* at 41, 75.

Hill accompanied the officers to a Montgomery County police station, where he was led to an interrogation room. 5/16/00 Hr'g Tr. 98. Unbeknownst to Hill, the officers arranged for the entire interrogation to be videotaped. *Id.* at 26-27, 182. Gilchrest appeared for the first time and, along with Roach (whom Gilchrest had briefed earlier), began the interrogation about 5:20 p.m. App. *infra*, 2a; 5/16/00 Hr'g Tr. 98-99. After eliciting some background information from Hill concerning his relationship with Allen, Gilchrest asked Hill where he was on the morning of October 2, 1997. 5/16/00 Hr'g Def. Exh. 2 at 25-26. Hill consistently stated that he was asleep at a friend's house. *Id.* at 32-34, 38; 5/16/00 Hr'g Tr. 101.

Approximately forty-five minutes into the interrogation, Gilchrest orally informed Hill of some of his *Miranda* rights. Gilchrest, however, omitted any mention of the consequences of making a statement. 5/16/00 Hr'g Def. Exh. 2 at 48-49. In other words, he failed to advise Hill that any

statement he made could be used against him in a court of law.[3]

For the next three hours, Gilchrest and Roach subjected Hill to what Gilchrest later agreed was "some fairly heavy duty interrogating." 5/16/00 Hr'g Tr. 189. Gilchrest told Hill that Gilchrest knew that "it was not an accident that [Allen] ended up where he ended up," 5/16/00 Hr'g Def. Exh. 2 at 96, that Hill was in the house that night, *id.* at 106-107, that witnesses placed Hill at the scene, *id.* at 107, that Hill had "every reason in the world" to kill Allen, *id.* at 116, and that he should be truthful about having gone over to Allen's house at 3:00 a.m., *id.* at 130.

For three hours, Hill repeatedly denied that he had been present at the scene of the alleged murder and arson. 5/16/00 Hr'g Def. Exh. 2 at 99, 108, 113, 115-116, 130-131; 5/16/00 Hr'g Tr. 101. Shortly before 8:00 p.m., Hill stated "[t]his is getting far enough that I feel . . . ,"[4] at which point Gilchrest interrupted and stated that he was "not in the business to [sic] trying to pin something on somebody." 5/16/00 Hr'g Def. Exh. 2 at 133. Gilchrest then appealed to Hill's self-interest: "[Y]ou drove over there * * * and some tragic accident happened," *id.* at 139; "I really believe in my heart that you never had an intention to hurt Bill," *id.* at 140; and "[t]hink about the other people involved in your life," *id.* at 154.

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[3] When orally advising Hill of *Miranda* rights, Gilchrest did not follow the procedure--which he had utilized in hundreds of investigations in the past—of reading the rights from a standard *Miranda* warning card (a "blue card"), and having the suspect initial the rights he was supposed to be waiving and sign the card on the back. 5/16/00 Hr'g Tr. 185-186. Gilchrest testified that he did not have a blue card with him in Maryland. *Id.* at 186.

[4] At the suppression hearing, Hill explained that, if given enough time to complete the thought, he was "certain that I felt I had said enough and I shouldn't say anything else without an attorney." 6/15/00 Hr'g Tr. 20.

Hill, while telling the officers that he was "tired," 5/16/00 Hr'g Def. Exh. 2 at 152, continued to deny that he had been present at Allen's house on the morning of October 2, *id.* at 138-140, 143-145, 154, 161, 163-164. At around 8:30 p.m., having reached an impasse, Gilchrest informed Hill that he was placing him under arrest pursuant to the credit card abuse warrant. Gilchrest did not, however, administer *Miranda* warnings at that point. *Id.* at 164-165. Instead, aware that Hill had previously expressed "concern[] about his momma's health," 5/16/00 Hr'g Tr. 189, Gilchrest told Hill that his mother was "not going to be a happy-camper" when she found out he would be spending the night in jail, 5/16/00 Hr'g Def. Exh. 2 at 166. The officers told Hill that he would be "a lot better" off if he admitted that he had gone to Allen's house on October 2 and that the two had had a physical altercation, but that Hill did not start the fire. *Id.* at 167. Hill stated: "Either way, you have a warrant, and I'm spending the night in jail," to which Gilchrest replied, "[w]ell, it depends on you. * * * [A]nd whether you're going to tell me the truth about what happened with [Allen]." *Id.* at 168.

Within seconds, Hill changed his story and admitted going to Allen's house on October 2. 5/16/00 Hr'g Def. Exh. 2 at 168. Hill stated that, upon entering the house, he had found Allen intoxicated and half-asleep on the couch. Hill stated that Allen jumped off the couch and knocked a table lamp onto Hill, at which point Hill gave Allen a "body block" that caused Allen to fall and hit his head hard on a coffee table. Allen refused Hill's offer to call an ambulance, instead yelling at Hill in a drunken rage to "get out!" *Id.* at 170-171. Hill stated that he took Allen's keys and moved his truck down the street because he didn't believe Allen should drive "in that condition." *Id.* at 172. Hill maintained that he had no idea how the fire started. *Id.* at 175.

Gilchrest excused himself to get his laptop computer in order to reduce Hill's statement to writing. Before

Gilchrest left the interrogating room, Hill asked, "[i]s there any possibility I could spend the night with my mother?" 5/16/00 Hr'g Def. Exh. 2 at 205-206. The officers then told Hill that he would have to spend the night in jail. *Id.* at 206-207. The officers then spent two additional hours pinning Hill down and committing him to his statement that he had been to Allen's residence the morning of the fire. No *Miranda* warnings were given during that process either. Instead, as Gilchrest and Roach interrogated Hill, Gilchrest typed a statement. See *id.* at 168-234. Eventually, Gilchrest requested that Hill read the statement and make any corrections. *Id.* at 233. Among other things, Gilchrest directed Hill to read the complete set of *Miranda* warnings printed at the top of the statement, which Gilchrest (incorrectly) identified as "[t]he same thing I told you before[.]" *Id.* at 234. Hill responded, "[u]h-huh." *Ibid.* Gilchrest testified that he departed from ordinary practice by *not* having Hill initial each warning individually. 5/16/00 Hr'g Tr. 186-187. At 11:00 p.m.—more than five hours after the interrogation began and more than two hours after his initial statement that he had been at Allen's residence—Hill signed the statement Gilchrest had typed. See Tr. State Exh. 30; 5/16/00 Hr'g Def. Exh. 2 at 242-243.

2. Hill was convicted in the Judicial District Court of Travis County, Texas, of murder and arson, and sentenced to 22 years of imprisonment. App., *infra*, 8a. Before trial, Hill moved to suppress both his videotaped oral statements and the written statement. Following a pretrial hearing, the trial judge held that the *Miranda* warnings given by Gilchrest after forty-five minutes of interrogation were incomplete under article 38.22 of the Texas Code of Criminal Procedure, TEX. CRIM. PROC. CODE ANN. art. 38.22 (West 1979).[5] App., *infra*, 44a-45a. The trial court,

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[5] Article 38.22 states in relevant part:

however, concluded that Hill was not in custody until the time he was arrested on the credit card abuse warrant. *Ibid.* As a result, the trial court held that Hill's videotaped oral statements before his formal arrest—in which he denied being at Allen's residence the morning of the fire—were admissible. *Ibid.* The trial court excluded the oral statements made after the arrest, before Hill was given written *Miranda* warnings. But the trial judge admitted into evidence Hill's post-arrest written statement in its entirety. *Ibid.* Without elaborating on the effect of the initial *Miranda* violations, the court stated: "The written warnings cured the omission of the oral warning, or the one omission if there was an oral warning." *Id.* at 45a.

3. On August 30, 2002, the Texas Court of Appeals for the Third Judicial District affirmed Hill's convictions in an

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Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement * * * received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

unpublished opinion. See App., *infra*, 28a-42a.[6] On December 5, 2002, the court of appeals denied rehearing, but substituted a new opinion, again affirming the convictions. See *id.* at 10a-27a. In that opinion, the court of appeals rejected Hill's contention that the written statement should have been suppressed because it was tainted by his earlier oral statement, which Hill argued was coerced. See *id.* at 16a-20a. The court of appeals stated that, "[i]n the absence of specific evidence that the oral statement played an actual role in appellant's decision to sign a written one," the trial court's suppression of the written statement should be upheld. *Id.* at 19a. The court never addressed Hill's claim that, under *Oregon* v. *Elstad*, 470 U.S. 298, 310-311 (1985), the written warnings did not constitute a "careful and thorough administration of *Miranda* warnings," Appellant's Br. at 47-48, and that the prior, incomplete warnings were therefore never cured. App., *infra*, 18a-20a.

Following a remand for further proceedings on a separate issue,[7] Hill filed consolidated petitions for discretionary review with the Texas Court of Criminal Appeals on June 4, 2004. His principal contention was that, given the nature and effect of the improper *Miranda* warnings, the written statement should have been suppressed. See Petition for Discretionary Review at 6-7.

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[6] The court of appeals consolidated Hill's appeals from his murder and arson convictions. See App., *infra*, 1a, 10a, 28a.

[7] Hill filed consolidated petitions for review with the Texas Court of Criminal Appeals, arguing (among other things) that the lower appellate court had failed to address one particular point of error—whether the written statement should have been suppressed as "the tainted fruit of an unlawful arrest." App., *infra*, 8a-9a. On June 11, 2003, the Texas Court of Criminal Appeals granted the petition as to that point only and remanded to the court of appeals; it dismissed the remaining claims without prejudice. *Ibid.* On remand, the court of appeals again affirmed Hill's conviction in an unpublished opinion on November 6, 2003. *Id.* at 1a-7a.

The State did not file an opposition brief. While that petition for review was pending, this Court issued its decision in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004). On July 5, 2004, Hill's counsel notified the Texas Court of Criminal Appeals of *Seibert* by letter. On September 22, 2004, the court denied Hill's petition for discretionary review in two, one-sentence postcards. App., *infra*, 48a-49a.

REASONS FOR GRANTING THE PETITION

The decision of the Texas Court of Appeals for the Third Judicial District should be vacated and remanded for reconsideration in light of this Court's decision in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004). This case, like *Seibert*, concerns the admissibility of a statement obtained after the belated administration of *Miranda* warnings, where the statement largely confirms statements obtained from the suspect through unwarned custodial interrogation in violation of *Miranda*. At the time the Texas Court of Appeals decided this case, the prevailing rule under *Oregon* v. *Elstad* was that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement," 470 U.S. at 314, and that "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible," *id.* at 310-311. In *Seibert*, however, this Court clarified and significantly narrowed the scope of that ruling. Because the Texas Court of Appeals decided this case without the benefit of *Seibert*—and because that court's decision is in numerous respects impossible to reconcile with *Seibert*—this Court should grant the petition, vacate the judgment below, and remand the case for reconsideration in light of that intervening decision. Alternatively, the Court should grant the petition and set this case for argument on the merits.

A. This Court's Intervening Decision In *Seibert* Clarifies The Admissibility Of Warned Confessions Following *Miranda* Violations

In *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), this Court conditioned the admissibility of confessions obtained through custodial interrogation on the accused having been "adequately and effectively apprised of his rights," and having chosen to waive those rights. Since then, this Court has repeatedly reaffirmed that warning the accused of the right to remain silent, the right to counsel, and that any statement can be used against him in later proceedings, all are critical to dispel the coercion inherent in custodial interrogation and to ensure that confessions are voluntary. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 435 (2000) ("[T]he admissibility in evidence of any statement given during custodial interrogation of a suspect * * * depend[s] on whether the police provided the suspect with four warnings."); *Elstad*, 470 U.S. at 307 ("Failure to administer *Miranda* warnings creates a presumption of compulsion."); *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) ("To combat * * * inherent compulsion, and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused."); *New York* v. *Quarles*, 467 U.S. 649, 654 (1984) ("Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right.") (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974)).

Nineteen years after *Miranda*, this Court in *Oregon* v. *Elstad*, *supra*, addressed a case in which the police, after obtaining an unwarned and therefore inadmissible custodial statement in violation of *Miranda*, belatedly administered *Miranda* warnings and obtained a second, warned statement. In *Elstad*, the police went to a young suspect's house to arrest him. While one officer spoke with the suspect's mother, another officer briefly told the suspect

that he "felt" that the young man had been involved in a burglary, at which point the young man acknowledged having been at the crime scene. The suspect was then transported to the station house. Before being questioned there, the suspect was provided with *Miranda* warnings. He made a full confession. Addressing the admissibility of that later, post-*Miranda*-warning confession, this Court rejected the argument that it should be suppressed as a "fruit" of the earlier, unwarned admission made in the suspect's living room. See 470 U.S. at 305-309; accord *Dickerson*, 530 U.S. at 441.

This Court likewise rejected the theory that, once an unwarned statement lets the "cat out of the bag," any later statement is inevitably a psychological product of the earlier statement. *Elstad*, 470 U.S. at 311-312. In the case before it, the Court pointed out, "the causal connection between any psychological disadvantage created by [the suspect's earlier, unwarned] admission and his ultimate decision is speculative and attenuated at best." *Id.* at 313-314. Finally, the Court noted that the unwarned statement in that case—which occurred "at midday, in the living room area of respondent's own home, with his mother * * * a few steps away"—was clearly voluntary, since "[n]either the environment nor the manner of either 'interrogation' was coercive." *Id.* at 315. "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement," the Court concluded, a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. The Court noted, however, that the "subsequent administration" had to be "a careful and thorough administration" to cure inadmissibility. *Id.* at 311.

Some 19 years after deciding *Elstad*, this Court last Term again addressed—and significantly limited—the admissibility of warned confessions that are obtained on the

heels of earlier unwarned statements. *Seibert*, 124 S. Ct. 2601 (plurality); *id.* at 2614 (Kennedy, J., concurring). In *Seibert*, the murder suspect was interrogated using a two-step technique. The suspect was first arrested, taken to a police station, and then questioned without *Miranda* warnings "for 30 to 40 minutes." *Id.* at 2606. After the suspect admitted her involvement in the murder being investigated, the interrogating officer allowed her a 20-minute coffee and cigarette break. The officer then "turned on a tape recorder, gave [the suspect] the *Miranda* warnings, and obtained a signed waiver of rights from her." *Ibid.* The officer resumed questioning by referring to the suspect's pre-warning statements, repeating their substance. *Ibid.* The interrogating officer testified that he had purposefully withheld *Miranda* warnings pursuant to an "interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Ibid.*

This Court found that such an interrogation technique—described by some as the "deliberate two-step strategy," *id.* at 2616 (Kennedy, J., concurring)—is designed solely "to get a confession the suspect would not make if he understood his rights at the outset * * * ." *Id.* at 2611 (plurality). "[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Ibid.* (quoting *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986)). Illustrating the confusion likely to flow from the administration of mid-interrogation warnings, the plurality noted that "telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given [earlier], could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence

being of no avail." *Ibid.* See also *id.* at 2615 (Kennedy, J., concurring) (belated warning of right to remain silent "permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made"). Such confusion, of course, undermines *Miranda's* goal of allowing suspects a "free and rational choice" about whether to speak. 384 U.S. at 464-465. Accordingly, the plurality announced that it "ordinarily [is] unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." 124 S. Ct. at 2611. Instead, such warnings will render a later confession admissible only if they "function 'effectively' as *Miranda* requires." *Id.* at 2610 (plurality).

Contrasting the facts of *Seibert* with those at issue in *Elstad*, the plurality concluded that the belated *Miranda* warnings given in *Seibert* itself were not sufficient to apprise the individual of his rights. The plurality explained that, in deciding that question, it would examine "the completeness and detail of the questions and answers in the first round of interrogation"; "the overlapping content of the two statements"; "the timing and setting of the first and the second"; "the continuity of police personnel"; and "the degree to which the interrogator's questions treated the second round as continuous with the first." 124 S. Ct. at 2612. In contrast to the *Elstad* interrogation—where "a person in the suspect's shoes could have seen the station house questioning as a new and distinct experience"—the interrogation in *Seibert* was "systematic, exhaustive, and managed with psychological skill." *Ibid.*

> When the police finished [the initial interrogation of Seibert], there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment.

> When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. * * * The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.

Ibid.

Rather than apply the plurality's multi-factor test to all two-step confessions, Justice Kennedy's concurring opinion focused on the "general goal of deterring improper police conduct." 124 S. Ct. at 2614 (quoting *Elstad*, 470 U.S. at 308). In his view, a "narrower test" should apply only where a two-step technique is used to "undermine the *Miranda* warning." *Id.* at 2616. "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* at 2616. Where the two-step strategy is used, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Ibid.* Justice Kennedy listed two examples of curative measures: "a substantial break in time and circumstances between the prewarning statement and the *Miranda* waiver," and "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." *Ibid.*

The dissenting opinion—although disagreeing on the result—agreed with the plurality in one important respect. Rejecting Justice Kennedy's approach, the dissent emphasized at some length that "the plurality correctly declines to focus its analysis on the subjective intent of the

interrogating officer." 124 S. Ct. at 2616 (O'Connor, J., dissenting); *id.* at 2617 ("The plurality's rejection of an intent-based test is also, in my view, correct."); *id.* at 2618-2619 (urging that inquiry into subjective intent is unworkable).

B. The Decision Below Was Decided Without Benefit Of And Is Inconsistent With *Seibert*

The Texas Court of Appeals decided this case before this Court decided *Seibert*. Because *Seibert* bears strongly on the proper disposition of this case—indeed, it is impossible to reconcile the decision below with that decision—the petition should be granted, the judgment should be vacated, and the case remanded for reconsideration in light of that intervening decision.

1. There is no dispute that Hill was not given proper *Miranda* warnings when the officers first began interrogating him. Nor were *Miranda* warnings given when, three hours into the "heavy duty" interrogation, 5/16/00 Hr'g Tr. 189, Hill was told that he was being placed under arrest, 5/16/00 Hr'g Def. Exh. 2 at 164-165. Likewise, no *Miranda* warnings were given when Hill—after still more interrogation in the station house—first made inculpatory statements. *Id.* at 168. Instead, Hill was advised of only certain of his rights, some forty-five minutes after the five-hour interrogation began and hours before he made the statements at issue here. *Id.* at 48-49. Even then, however, the officer failed to advise Hill of the adversarial consequences of making a statement—*i.e.*, he failed to tell Hill that his statement could be used against him in a court of law. *Ibid.* This Court has recognized that warnings that omit that critical factor are the constitutional equivalent of no *Miranda* warnings at all. *Miranda*, 384 U.S. at 469 ("It is only through an awareness of [the adversarial consequences] that there can be any assurance of real understanding and intelligent exercise of the privilege.").

Thus, there can be no dispute that, when Hill was being interrogated from approximately 8:30 p.m. to 10:45 p.m., see 5/16/00 Hr'g Def. Exh. 2 at 168-234—when he orally admitted to having been at the scene of the fire and having an altercation with the victim, when the officers repeatedly committed him to that story, and as one of them typed his statement while questioning him further—Hill had not been warned that anything he said could or would be used against him in a court of law. Hill was warned of that consequence only when asked to read the resulting written statement and sign it. Consequently, under the analysis of the plurality in *Seibert*, the only question is whether the provision of written *Miranda* warnings, at the time Hill was provided with his written statement for signature, "could function 'effectively' as *Miranda* requires." 124 S. Ct. at 2610. The answer is unquestionably "no."

As an initial matter, Officer Gilchrest incorrectly told Hill that the written warnings were "[t]he same thing I told you before," 5/16/00 Hr'g Def. Exh. 2 at 234, even though Gilchrest had previously failed to tell Hill that anything Hill said could be used against him, *id.* at 48-49. That critical error alone renders the later warnings insufficient. Moreover, *Seibert* singles out the belated administration of the warning of adversarial consequences as particularly misleading. Its deliverance mid-stream ordinarily leads to the "entirely reasonable inference that what [the suspect] has just said" before receiving the warning "will be used" against him, making further silence futile. 124 S. Ct. at 2611.

All of the factors identified by the plurality in *Seibert* point the same way. Here, as in *Seibert*, the interrogation was "systematic, exhaustive, and managed with psychological skill." 124 S. Ct. at 2612. Hill was interrogated for approximately five hours under conditions that Detective Gilchrest agreed were "stressful." 5/16/00 Hr'g Tr. 195. Indeed, the officers employed several of the very

interrogation techniques described by this Court in *Miranda*, *supra*, including repeated accusations, suggestions of different versions as to how Allen's death could have occurred, lying about the evidence they had, and expressing sympathy. 4 Trial Tr. 64-65, 73-74; 5/16/00 Hr'g Tr. 208-209. At one point, Hill attempted to tell the officers that he no longer wished to be questioned, but was interrupted by Gilchrest, who pressed on. 5/16/00 Hr'g Def. Exh. 2 at 133. Later, when it became apparent that Hill was not going to confess under ordinary interrogating pressures, he was placed under arrest for credit card abuse. *Id.* at 164. Knowing Hill's concern for his elderly mother, 5/16/00 Hr'g Tr. 189-190, Gilchrest implied that Hill might be able to avoid spending the night in jail if he confessed, 5/16/00 Hr'g Def. Exh. 2 at 168 ("Well, it depends on you. * * * [A]nd whether you're going to tell me the truth about what happened with [Allen]."). Within seconds, Hill stated that he had gone to Allen's house on the morning of October 2. *Ibid.*

As in *Seibert*, when the officers finished interrogating Hill without proper *Miranda* warnings—pinning him down on details and reducing the statement to writing, *id.* at 169-234—there "was little, if anything, of incriminating potential left unsaid." 124 S. Ct. at 2612. As in *Seibert*, the "completeness and detail of the questions and answers" in the first and second rounds were identical, as were the "overlapping content of the two statements." *Ibid.* As in *Seibert*, the same police personnel interrogated Hill throughout the entire ordeal. And while the "warned phase of questioning" in *Seibert* at least "proceeded after a pause of only 15 to 20 minutes," *ibid.*, in this case the process continued with only a minimal break—long enough to print Hill's statement—between Hill's provision of an unwarned (and therefore inadmissible) statement and his being presented with a written version of that statement for

signature. 5/16/00 Hr'g Def. Exh. 2 at 233.[8] There is, therefore, no chance that "a reasonable person in [Hill's] shoes could have seen" the presentment of the written statement as "a new and distinct experience from giving the earlier unwarned statement." *Seibert*, 124 S. Ct. at 2612.

Indeed, *Seibert* makes this an *a fortiori* case. Unlike in *Seibert*, the substance of the postwarning statement consisted of nothing more than Hill's signature. *Miranda*, however, requires that a suspect "must be warned prior to any questioning," not merely before signing-off on a prior, otherwise inadmissible statement. 384 U.S. at 479; *Seibert*, 124 S. Ct. at 2608 ("*Miranda* warnings are customarily given under circumstances allowing for a real choice between *talking* and remaining silent.") (emphasis added). Instead of facing a "genuine choice whether to follow up on the earlier admission," *id.* at 2612, Hill was faced only with whether to acknowledge that the written statement reflected the statement he had already given. Especially in view of *Siebert*, however, *Miranda* "undisputably requires a law enforcement agent to give the appropriate legal

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[8] The interrogation transcript shows that four short breaks were taken over the course of the five-and-a-half-hour interrogation. The first break was taken before administration of the incomplete *Miranda* warnings, supposedly because Gilchrest needed to use the bathroom. 5/16/00 Hr'g Def. Exh. 2 at 34. The second break was taken shortly before 7:30 p.m., after Officer Drewry told Gilchrest that he had received an "emergency phone call," *id.* at 108; in fact, that was a "ruse" to allow Drewry an opportunity to change the videotape without alerting Hill, 5/16/00 Hr'g Tr. 24-25. The third break was taken around 9:30 p.m., but only after Hill had made his oral statement and Gilchrest had retrieved his laptop and begun typing Hill's written statement. 5/16/00 Hr'g Def. Exh. 2 at 209-210. Finally, a break was taken at about 10:45 p.m., when Gilchrest left to print Hill's written statement. *Id.* at 233. Only the third break appears to have been taken for Hill's benefit, and then only so that Hill could call his mother to inform her that he would be spending the night in jail. *Id.* at 208-209.

warnings before any questioning * * * , not merely prior to signing a written statement after all the custodial interrogation is complete." *Jones* v. *State*, 119 S.W.3d 766, 774 n.16 (Tex. Crim. App. 2003).

Finally, the provision of written *Miranda* warnings here were deficient even by the standards articulated in *Elstad*. *Elstad* required that a failure to properly *Mirandize* suspects be cured by "a careful and thorough administration of *Miranda* warnings." *Elstad*, 470 U.S. at 311.[9] In *Elstad*, this requirement was satisfied where, *inter alia*, the officers "advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and, having these rights in mind, wished to speak with the officers." *Id.* at 301. *Seibert* elaborated on this requirement by stating that the absence of "a formal addendum warning that a previous statement could not be used," while not dispositive, is "clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation." 124 S. Ct. at 2612 n.7; see *id.* at 2616 (Kennedy, J., concurring) (stating that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient" to cure use of the deliberate two-step interrogation technique). In

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[9] In *Elstad*, a police officer different from the one who took the unwarned statement orally read the *Miranda* rights to the suspect at a different location from that of the first unwarned statement. The officer had the suspect sign the waiver card. *Elstad*, 470 U.S. at 301-302. Moreover, in *Elstad*, the police officer first secured the suspect's waiver of his *Miranda* rights, and thereafter secured a full detailed statement of the suspect's involvement in the crime, details of which had not been supplied to the police prior to the properly secured waiver. *Ibid.* In Hill's case, the police first secured all the details of the statement, and then had Hill sign a type-written version with the same facts, only this time with printed *Miranda* warnings at the beginning.

this case, far from informing Hill that his oral statement (and the written statement) were likely inadmissible, Gilchrest incorrectly told Hill that the written warnings were the "same thing" administered four hours earlier. 5/16/00 Hr'g Def. Exh. 2 at 234.[10] Hill's response indicates that he trusted Gilchrest's representation, *ibid.*, thereby confirming the very danger described in *Seibert*. See 124 S. Ct. at 2611 ("What is worse, telling a suspect 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail."). Indeed, Gilchrest testified that he did not have Hill "initial each individual warning," as he often does when administering *Miranda* warnings "on the face" of a written statement. 5/16/00 Hr'g Tr. 186-187. In sum, rather than advise Hill as to whether he still had a "real choice" in whether to participate by signing the written statement, Gilchrest's administration of the written *Miranda* warnings was at best misleading. 124 S. Ct. at 2610-2611; cf. 124 S. Ct. at 2616 (Kennedy, J., concurring) ("Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.").[11]

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[10] The exchange was as follows:

Q. * * * Did you start from the top?

A. Uh-huh.

Q. Okay. You read all these warnings?

A. Uh-huh.

Q. The same thing I told you before?

A. Uh-huh.

5/16/00 Hr'g Def. Exh. 2 at 234.

[11] The impact on Hill of Gilchrest's false statement was worse than the impact of the police failure to warn in *Seibert*. At the time Hill was confronted with the choice whether or not to confirm his oral

In Hill's case, the appellate court denied Hill's *Miranda* claim because of the "absence of specific evidence that the oral statement played an actual role in appellant's decision to sign a [subsequent] written [statement] * * * ." App., *infra*, 18a. That legal standard cannot survive this Court's subsequent *Seibert* decision, which recognizes that it is "ordinarily * * * unrealistic to treat two spates of integrated and proximately conducted questioning"—and *a fortiori* questioning followed by a mere signature—"as independent" simply "because *Miranda* warnings formally punctuate them in the middle." 124 S. Ct. at 2611. Moreover, the Texas appellate court's "specific evidence" standard is inconsistent with *Miranda's* requirement that the State carries a "heavy burden" of "demonstrat[ing] that the defendant knowingly and intelligently waived his privilege against self-incrimination * * * ." *Miranda*, 384 US. at 475. Finally, that standard is incompatible with this Court's *Elstad* requirement that an initial failure to give *Miranda* warnings be cured by "a *careful* and *thorough* administration of *Miranda* warnings," *Elstad*, 470 U.S. at 311 (emphasis added)—a requirement the appellate court entirely ignored.

2. The decision likewise cannot be reconciled with the rationale of Justice Kennedy's concurring opinion in *Seibert*. Unlike the objective approach adopted by the plurality (and endorsed by the dissent), the concurring opinion suggested that courts should look to whether the

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incriminating statement by signing the written statement, Gilchrest had led him to believe that he had orally given the same incriminating statement in the presence of an FBI witness after being orally warned of the consequences of giving the statement. Thus, Hill was left with no logical reason to refuse to confirm his prior and unwarned statement in writing. Simply put, Gilchrest misled Hill into believing that "it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seibert*, 124 S. Ct. at 2613.

strategy was "deliberate" or "calculated." 124 S. Ct. at 2616 (Kennedy, J., concurring). Here, there is substantial evidence to support the conclusion that the officers made a deliberate choice not to provide Hill with full *Miranda* rights at various points throughout the proceeding.[12] Proper *Miranda* warnings were notably absent at critical junctions where one would ordinarily expect them to be given. Although Gilchrest and Roach both testified that they considered Hill to be a suspect at the time he was brought to the police station, 5/16/00 Hr'g Tr. 87, 153, Hill was not given *Miranda* warnings at that point. Nor was he given *Miranda* warnings when he was advised that he was under arrest. 5/16/00 Hr'g Def. Exh. 2 at 164-165.

Indeed, the officers conducted the interrogation in a manner deliberately designed to prevent Hill from being concerned about the adversarial consequences of any statements he might make. Gilchrest, for example, testified that he did not tell Hill that the interrogation was being videotaped because he was afraid that Hill "might worry that it might be used against him later on in some court proceeding or trial." 5/16/00 Hr'g Tr. 182. Likewise, Montgomery County police officer James Drewry, who videotaped the entire interrogation from an adjacent room, testified that informing Hill of the videotape would have put him "on the defensive," and that Hill "would be concerned

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[12] Justice Kennedy's concurrence does not suggest that the officers must admit their intent to use a two-step interrogation technique; rather, a conscious decision to defer administration of warnings is the sort of thing that can be inferred from evidence in the record. See 124 S. Ct. at 2618 (O'Connor, J., dissenting) ("Even in the simple case of a single officer who claims that a failure to give *Miranda* warnings was inadvertent, the likelihood of error will be high.") (citing W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996) ("[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive.")).

that that tape might be used against [him] in some courtroom proceeding or at some trial." *Id.* at 26-27.[13] Under the circumstances, it is fair to infer that the officers deferred giving *Miranda* warnings throughout the interrogation and omitted any warning that Hill's statements could be used against him—a conspicuous omission that must have been obvious to the three officers with sixty years of law-enforcement experience among them, *id.* at 9, 83, 131—for the same reason. Under the circumstances, the issue must be addressed on remand. Cf. *United States* v. *Stewart*, 388 F.3d 1079, 1091 (7th Cir. 2004) (remanding to the trial court because "the record does not speak to whether the two-step interrogation in this case was deliberately used in circumvention of *Miranda*"); *United States* v. *Aguilar*, 384 F.3d 520, 524-525 (8th Cir. 2004) (affirming the suppression of a suspect's confession and, in doing so, relying on findings of fact made before the issuance of *Seibert* to determine that "the method and timing of the two interrogations establish intentional, calculated conduct by the police").

3. Moreover, the reasoning of Justice Kennedy's concurring opinion does not extend to the type of police conduct at issue in this case. Justice Kennedy did not issue

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[13] Officer Drewry described the "ruse" used by the officers to prevent Hill from learning that the interrogation was being videotaped. 5/16/00 Hr'g Tr. 24-25. Before one of the two bathroom breaks taken over the course of the five-and-a-half hour interrogation, Drewry notified Gilchrest that he had received an "emergency phone call" so that Gilchrest would leave the interrogating room, allowing Drewry to change the tape. *Ibid.* An officer thereafter accompanied Hill to the bathroom so that he would not discover the tape recording in the adjacent room. *Id.* at 25-26. There is other evidence of the officers' subjective intent to deceive Hill. Even before the interrogation began, Gilchrest hid in a parked car down the street from Hill's mother's house and did not alert Hill as to his presence in Maryland because he feared that Hill would not talk to him. *Id.* at 74, 170-171, 174.

a blank check to police to excuse any type of police misconduct by pleading innocent intent. Instead, he carefully described the types of police misconduct that would support an excuse from *Miranda's* exclusionary rule:

> An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection.

Seibert, 124 S. Ct. at 2615. These are all situations in which police officers may make mistakes because of the exigencies of the investigation of a crime, or the ambiguities of the judicial rule—such as the definition of "custody"—that the police must apply in the real world. Assuming, *arguendo*, that under Justice Kennedy's overall balancing approach, these types of situations are "legitimate interests" to be weighed, *id.* at 2614, they have no application to the *Miranda* violations here.

There is no investigative exigency or ambiguity that legitimately excused the police failure to give Hill timely warnings that his statements may be used against him in court. All three of the experienced law enforcement agents knew that they were obligated to give the warning before interrogation. The interrogation was carefully and elaborately game-planned in advance, and continuously monitored and recorded. The law enforcement personnel involved had ample time to do everything necessary to ensure timely and complete administration of the *Miranda* rights. In short, there is no objective excuse for the failure to observe *Miranda's* clear requirements.[14]

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[14] If, on this record, a police plea of "innocent" or "good faith" error is allowed to defeat the constitutional *Miranda* right to a timely warning, then the police can always defeat *Miranda* by claiming that

Finally, Justice Kennedy's overall balancing approach requires that courts determine whether or not the "central concerns of *Miranda* are * * * implicated * * *." 124 S. Ct. at 2614. In Hill's case, the police fully utilized the same interrogation tactics found by this Court in *Miranda* to be inherently coercive. Thus, the central concerns of *Miranda* are directly implicated, and this case is a far cry from *Elstad*, where "[n]either the environment nor the manner of either 'interrogation' was coercive." 470 U.S. at 315. In sum, applying Justice Kennedy's overall approach to the record in this case leads to the same conclusion as applying the plurality opinion: that the admission of Hill's written statement at trial was inconsistent with *Miranda*.

C. This Court's Routine Practice Is To Grant The Petition For A Writ Of Certiorari, Vacate The Judgment Below, And Remand For Reconsideration Under These Circumstances

Where an intervening decision of this Court changes a question of federal law upon which a state court decision is predicated, this Court customarily grants the petition, vacates the judgment below, and remands to the lower court (GVR). *Sarr* v. *Wyoming*, 125 S. Ct. 297 (2004); *Robinson* v. *Story*, 469 U.S. 1081 (1984); *Lawrence* v. *Chater*, 516 U.S. 163, 180 (1996) (Scalia, J. dissenting) ("By 1945, we could state that it was '[a] customary procedure' for the Court 'to vacate the judgment of [a] state court where there has been a supervening event since its

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they had a memory lapse. Allowing such a defense reduces the *Miranda* constitutional right to a mere "'form of words.'" *Miranda*, 384 U.S. at 444 (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)); see also *United States* v. *Leon*, 468 U.S. 897, 922 (1984) ("[G]ood faith exception to the exclusionary rule's application in the Fourth Amendment context requires that the police officer's reliance on the magistrate's issuance [of the warrant] be objectively reasonable."); *Seibert*, 124 S. Ct. at 2613-2614 (Breyer, J., concurring) (applying a *Leon*-type good faith exception).

rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances.'") (quoting *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U.S. 154, 161 (1945)). There can be little doubt that precisely the same course is warranted here. *Seibert* substantially altered—or at least significantly clarified—the analysis applicable to incriminating statements obtained after the provision of *Miranda* warnings where the suspect has already given an unwarned statement; *Seibert* is particularly instructive where, as here, the two statements are closely linked in substance, time, location, and other circumstances, and there is evidence that warnings were intentionally withheld. The only courts to have addressed the issue on the merits in this case, however, rendered their judgments before *Seibert* was decided. Because the "intervening" decision in *Seibert* not only bears strongly on, but has the potential to "determine the ultimate outcome" on redetermination, a GVR is appropriate. *Chater*, 516 U.S. at 167.

D. Alternatively, This Court Should Grant The Petition And Set This Case For Hearing On The Merits

In the event this Court concludes that further evaluation of this case is more appropriate than redetermination by the Texas appellate courts, the Court should grant the petition for a writ of certiorari and set this case for argument on the merits.

One of the central virtues of *Miranda* is the clarity of the required warnings and their application. *Burbine*, 475 U.S. at 425-426 ("We are unwilling to modify *Miranda* in a manner that would so clearly undermine the decision's central 'virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation and of informing courts under what

circumstances statements obtained during such interrogation are not admissible.'") (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979)); see also *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring) ("*Miranda's* clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity.").

Miranda's clarity is severely undermined by a rule that leaves uncertain the true boundaries of a police state-of-mind exception to *Miranda's* requirements. Such a rule does not merely undermine police investigations; it also multiplies the need for and complexity of motion practice in criminal cases. In the event the Court does not GVR, it should grant the petition for a writ of certiorari and clarify the boundaries of any such police defense to *Miranda* violations.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Texas Court of Appeals should be vacated, and the case remanded to that court for further consideration in light of this Court's intervening decision in *Seibert*. Alternatively, this Court should grant the petition and set the case for argument on the merits.

Respectfully submitted,

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APPENDICES

APPENDIX A

TEXAS COURT OF APPEALS
THIRD DISTRICT AT AUSTIN

ON REMAND

NO. 03-01-00232-CR
NO. 03-01-00233-CR

WILLIAM ETHRIDGE HILL, JR., APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
331ST JUDICIAL DISTRICT
NOS. 0981472 & 0981493
HONORABLE BOB PERKINS, JUDGE PRESIDING

Memorandum Opinion

This Court previously affirmed appellant William Ethridge Hill's convictions for arson and murder. *Hill v. State*, Nos. 03-01-00232-CR & 03-01-00233-CR, 2002 Tex. App. LEXIS 8534 (Tex. App.—Austin Dec. 5, 2002) (not designated for publication). On his petition for discretionary review, appellant urged (among other things) that we failed to address every issue raised in his brief. After granting only this ground for review, the court of criminal appeals summarily remanded the appeal to this Court to address appellant's sixth point of error. *Hill v. State*, Nos. 2220-02 & 2221-02 (Tex. Crim. App. June 11, 2003) (not designated for publication). By this point, appellant contends the district court should have suppressed his written statement to the police because it

was the tainted fruit of an unlawful arrest. We will overrule this contention and reaffirm the judgments of conviction.

Background

William Allen's body was found in the remains of his burned residence on the morning of October 2, 1997. The fire was determined to be arson, and Allen's death was ruled a homicide following an autopsy. Investigating officers learned that appellant had lived in Allen's house, was seen entering and leaving the house only minutes before the fire was discovered, and left Austin for Maryland on the day of the fire. Austin police officer Mark Gilchrest contacted appellant later that month, and appellant agreed to be interviewed in Maryland.

Armed with a capias for appellant's arrest issued after he was indicted for the unrelated offense of credit card abuse, Gilchrest traveled to Maryland on October 28. The next day, appellant voluntarily met with Gilchrest and Agent Ed Roach of the Federal Bureau of Investigation at the offices of the Montgomery County, Maryland, police department. The interview began at 5:20 p.m., lasted until 11:00 p.m., and was videotaped in its entirety. Appellant was not under arrest when the interview began. After about one hour, Gilchrest orally advised appellant of his rights, but failed to tell him that any statement he made might be used against him in court. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); Tex. Code Crim. Proc. Ann. art. 38.22 § 2(a) (West 1979). After two more hours of questioning, at about 8:30 p.m., Gilchrest informed appellant that he was under arrest for credit card abuse.[1] Soon thereafter, appellant admitted for the first time that he had been at Allen's house on the morning of the fire. At 9:45 p.m., Gilchrest began to type a written statement on

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[1] In our previous opinion, we incorrectly stated that appellant was arrested at this time for arson and murder.

his portable computer for appellant's signature. This took about an hour, during which Gilchrest and Roach continued to question appellant. The final, printed statement contained all of the warnings required by article 38.22, section 2(a). Appellant signed the statement at 11:00 p.m.

While Gilchrest and Roach were interviewing appellant, Montgomery County detective Robert Reed was obtaining a fugitive warrant for appellant's arrest. At 11:04, minutes after appellant signed the written statement, Reed told appellant that he was under arrest as a fugitive. Appellant was then taken before a magistrate, who signed the fugitive warrant and delivered a copy to appellant after midnight.

Appellant moved to suppress both his videotaped oral statements and the written statement. The district court found that appellant had not been in custody during the interview until Gilchrest told him he was arrested for credit card abuse. Therefore, the court overruled the suppression motion with respect to appellant's oral statements prior to the arrest, but granted it as to the subsequent oral statements because appellant had not been fully advised of his rights. The court refused to suppress the written statement, finding that the printed statutory warnings had been read and understood by appellant before he signed it. In our previous opinion, we overruled appellant's points of error challenging the admission of his oral statements. *See Hill*, slip op. at 4-7, LEXIS 8534 at *5-10. We also addressed and rejected some of appellant's arguments challenging the admission of the written statement. *See id.*, slip op. at 7-10 LEXIS 8534 at *10-16. The only unaddressed point of error, and the only issue now before us, is appellant's contention that his written statement was tainted by an unlawful arrest.

Discussion

Appellant argues that his arrest for credit card abuse was unlawful for three reasons: (1) the authority to arrest

granted by the Travis County capias did not extend beyond the borders of Texas; (2) Gilchrest did not have the jurisdictional authority to arrest him in Maryland; and (3) there were no exigent circumstances authorizing Gilchrest to arrest him pursuant to code of criminal procedure article 14.04. Tex. Code Crim. Proc. Ann. art. 14.04 (West 1977) (arrest of escaping felon). The State concedes that the capias was ineffective outside Texas. *See* Tex. Code Crim. Proc. Ann. art. 15.06 (West Supp. 2003). We agree with the State, however, that Gilchrest was authorized to arrest appellant without a warrant pursuant to the Uniform Criminal Extradition Act. *See id.* art. 51.13 (West 1979). For this reason, it is unnecessary to decide whether article 14.04 applies in this cause. We also conclude that even if the challenged arrest were unlawful, the taint was attenuated when appellant signed his written statement.

Was appellant unlawfully arrested?

Under indictment in Texas for the felony of credit card abuse and having been found in Maryland, appellant was a fugitive within the meaning of the Uniform Criminal Extradition Act. *See Ex parte Sanchez*, 987 S.W.2d 951, 952-53 (Tex. App.—Austin 1999, pet. ref'd, untimely filed). In a memorandum to the district court in support of his motion to suppress, appellant conceded that the Texas capias was sufficient probable cause to obtain a fugitive warrant in Maryland for the purpose of extradition. Appellant's memorandum went on, however, to mistakenly assert that a fugitive warrant was the only lawful basis for arresting him. To the contrary, the uniform act as adopted in Texas provides that "a person may be lawfully [arrested]... by any peace officer or private person, without a warrant upon reasonable information that the accused stands charged in the courts of a State with a crime punishable by death or imprisonment for a term exceeding

one year." Tex. Code Crim. Proc. Ann. art. 51.13, § 14 (West 1979).[2] Section 14 authorizes the arrest of a fugitive without a warrant. *Heard v. State*, 701 S.W.2d 298, 302 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd). Moreover, the statute authorizes the arrest of a fugitive by a private person. Because Gilchrest had reasonable information that appellant was accused of a felony in Texas, he was authorized to arrest appellant even though he was outside his territorial jurisdiction and did not have a warrant. *See United States v. Johnson*, 815 F.2d 309, 313-14 (5th Cir. 1987). Appellant's contention that the arrest was unlawful therefore fails.

Was the taint, if any attenuated?

We will also consider whether appellant's written confession was admissible even if the arrest was improper. This requires us to consider four factors: (1) whether *Miranda* warnings were given, (2) the temporal proximity of the arrest and the confession, (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct. *Dowthitt v. State*, 931 S.W.2d 244, 261 (Tex. Crim. App. 1996). These factors do not necessarily carry equal weight, and it is not required that each factor be resolved in the State's favor. *Juarez v. State*, 758 S.W.2d 722, 780 (Tex. Crim. App. 1988).

The first factor weighs in favor of the State. The written statement began with a listing of the rights afforded by *Miranda* and article 38.22, and a recitation that appellant fully understood those rights. In our earlier opinion, we rejected appellant's contention that these written warnings

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[2] Appellant's memorandum to the district court specifically cited article 51.13, section 14. Appellant did not cite, offer evidence regarding, or ask the district court to take judicial notice of the law of Maryland. Under the circumstances, we may presume that the relevant Maryland law is the same as the law of Texas. *Crane v. State*, 786 S.W.2d 338, 346, n.1 (Tex. Crim. App. 1990).

were a nullity because he had been told that they basically consisted of the same, imperfect warnings he had previously been given orally. *Hall*, slip op. at 9-10, LEXIS 8534 at *14. Although not alone sufficient to attenuate the taint of an unlawful arrest, advising a defendant of his *Miranda* rights is an important factor favoring the admission of a subsequent statement. *Maixner v. State*, 753 S.W.2d 151, 156 (Tex. Crim. App. 1988).

Prior to being told he was under arrest, appellant had adamantly denied being at Allen's house on the morning of the fire. After Gilchrest told him he was arrested, however, appellant almost immediately changed his story and admitted being at the house. During subsequent questioning, appellant elaborated on his activities at the crucial time and ultimately admitted that he knocked Allen to the floor before he left the house. He continued to deny setting the fire and insisted that Allen was conscious when he last saw him. These facts were incorporated into the written statement appellant signed two-and-a-half hours after being told he was arrested. We conclude that the temporal proximity of the arrest and the written statement and the absence of intervening circumstances weigh in appellant's favor. *See Bell v. State*, 724 S.W.2d 780, 788-89 (Tex. Crim. App. 1986).

We believe that the "purpose and flagrancy" factor is determinative. This is not a case in which a police officer deliberately arrested a suspect without probable cause for the purpose of engaging in a fishing expedition or inducing a confession. Appellant voluntarily went to the police station for questioning. Based on the capias, there was probable cause to arrest him as a fugitive at all relevant times. The only arguable basis for concluding that the arrest was unlawful was Gilchrest's lack of authority as a

law enforcement officer in Maryland.[3] Appellant appears to concede that Agent Roach, who was present when Gilchrest announced that appellant was under arrest, and either of the two Maryland police officers who transported him to the station could have made the arrest. There is no evidence to suggest that the course of appellant's questioning would have altered in any way if Roach, rather than Gilchrest, had informed appellant that he was under arrest. Even if Gilchrest personally lacked authority to arrest appellant, the arrest was not under the circumstances an act of purposeful or flagrant misconduct so serious as to taint what was otherwise shown to be a voluntary written statement given in full compliance with article 38.22. *See Self v. State*, 709 S.W.2d 662, 667-68 (Tex. Crim. App. 1986).

We overrule point of error six. Having previously overruled appellant's other points of error, we again affirm the judgments of conviction.

David Puryear, Justice

Before Chief Justice Law, Justices Kidd and Puryear
Affirmed
Filed: November 6, 2003
Do Not Publish

[3] In his supplemental reply brief filed in this Court on October 28, 2003, appellant seeks for the first time to rely on the law of Maryland. In Maryland, a law enforcement officer may arrest a fugitive without a warrant on the same basis as in Texas. Md. Code Ann., Crim. Proc. § 9-114(a) (2002). Section 9-114 is substantively identical to its statutory predecessor in effect at the time appellant was arrested. *See* former Md. Ann. Code, art. 41, §2-214 (1957).

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

WILLIAM ETHRIDGE HILL, JR., APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

NOS. 2220-02, 2221-02.

June 11, 2003

Opinion

A jury convicted Appellant of murder and arson. See V.T.C.A. Penal Code §§ 19.02 & 28.02. The jury assessed punishment at confinement for twenty-two years in each case. The Court of Appeals affirmed the conviction after finding that the evidence was legally and factually sufficient, Appellant's non-custodial and written statements were properly admitted, complained-of hearsay evidence was properly admitted, and the trial court properly denied Appellant's motion for new trial. *Hill v. State*, No. 03-01-00232-CR & 03-01-0233-CR (Tex. App. Austin, delivered December 5, 2002). Appellant has filed a petition for discretionary review.

In Appellant's petition, he contends the Court of Appeals erred by failing to address every issue raised in his brief. In his sixth point of error, he alleged, in part, that his written statement was tainted by his illegal arrest. Specifically, Appellant argued that because Austin Police Detective Mark Gilchrest was outside of his jurisdictional authority without valid process for the State of Maryland when he arrested Appellant, Appellant's arrest was illegal and, thereby, the arrest tainted his written statement.

Appellant further argued that there were no circumstances between the arrest and his statement to attenuate that taint. Because this ground was "necessary to final disposition of the appeal," the Court of Appeals was required to address it. Tex. R. App. P. 47.1. We agree.

Therefore, we grant ground two only of Appellant's petition for discretionary review, and remand the case to the Court of Appeals for reconsideration of Appellant's sixth point of error that is necessary to a final disposition of the appeal. Rule 47.1. Appellant's remaining grounds for review are dismissed without prejudice.

APPENDIX C

TEXAS COURT OF APPEALS
THIRD DISTRICT AT AUSTIN

ON MOTION FOR REHEARING

NO. 03-01-00232-CR
NO. 03-01-00233-CR

WILLIAM ETHRIDGE HILL, JR., APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
331ST JUDICIAL DISTRICT
NOS. 0981472 & 0981493
HONORABLE BOB PERKINS, JUDGE PRESIDING

We withdraw our opinion and judgment dated August 30, 2002, and substitute the following opinion.

Appellant William Ethridge Hill, Jr., brings this consolidated appeal from his convictions for arson and murder. *See* Tex. Pen. Code Ann. §§ 19.02; 28.02 (West 1994 & Supp. 2002). In five issues, appellant contends that (1) the evidence is legally and factually insufficient to support his convictions; (2) the trial court erred by admitting appellant's oral statement; (3) the trial court erred by admitting appellant's written statement; (4) the trial court erred by admitting hearsay evidence; and (5) the trial court abused its discretion by denying appellant's motion for new trial. We will affirm the judgment of the trial court.

Background

In the early morning hours of October 2, 1997, the Austin Fire Department received an alarm concerning a fire at the residence of William Allen. Allen's badly burned body was discovered in the house, and the medical examiner determined that he had suffered a severe blow to his face which rendered him unconscious before his death. The medical examiner concluded that Allen died of smoke inhalation and ruled the case a homicide.

Lieutenant Michael Crabill, an arson investigator, determined that the point of origin of the fire was in the living room, in the southeast corner, in and around a reclining chair. He also determined that the fire was started by an open flame. Further, firefighters noted that two gas burners on the stove in the kitchen has been turned to the "on" position. Neighbors and firefighters did not realize the deceased was in the burning house because his vehicle was not parked in his driveway. In a statement to police, appellant later admitted that he moved the deceased's vehicle down the street on the morning of the fire.

Detective Mark Gilchrest of the Austin Police Department began an investigation and discovered that the deceased had a roommate who had recently moved out of the house. Appellant was identified as the roommate. Billy Gene Harris, a neighbor of the deceased, testified that at 3:00 a.m. on the morning of October 2, 1997, he saw a person matching appellant's description get out of a car parked down the street from the deceased's house. Harris saw this individual walk toward the deceased's house and return to his vehicle about twenty minutes later. Neighbors discovered the fire coming out of the deceased's house at approximately 3:45 a.m.

Detective Gilchrest met with some of appellant's acquaintances and learned that he left Austin on the day of

the fire to visit his mother in the Washington, D.C. area. As a result of his investigation, Gilchrest also determined that appellant had recently stolen and forged several of the deceased's checks and that the deceased had planned to file charges against appellant.

On October 10, Gilchrest contacted appellant at his mother's home, asked him if he planned to return to Austin, and told him that they needed to talk further. Gilchrest also made arrangements to meet with FBI agent Ed Roach in Montgomery County, Maryland, to set up an interview with appellant.

On October 28, Roach and two officers from Maryland picked up appellant at his mother's home. Appellant voluntarily accompanied them, and voluntarily met with Gilchrest and Roach at the Montgomery County Police Department. Forty-five minutes after being placed in an interview room, appellant was orally advised of his rights by Gilchrest. After three hours of interrogation, Gilchrest informed appellant that he was under arrest for arson and murder. Thereafter, appellant admitted that he was present at Allen's house on the night he died. Appellant's statements were then reduced to writing, with the written statement including *Miranda* warnings.

After a suppression hearing, the district court did not file findings of fact or conclusions of law; rather, the court stated its findings on the record. The district court determined that, although the warnings given by Detective Gilchrest to appellant regarding his rights did not comply with article 38.22, the portion of appellant's oral statement made before being told he was under arrest was nonetheless admissible because appellant was not in custody at that time. *See generally* Tex. Code Crim. Proc. Ann. art. 38.22 (West 1979). However, the district court suppressed that portion of the oral statement made after appellant was informed of his arrest because the court

already determined the inadequacy of the pre arrest oral warnings. Finally, after determining the adequacy of the written *Miranda* warnings, the district court admitted appellant's post arrest written statement.

On February 7, 2001, the trial court rendered judgment on a jury verdict convicting appellant of arson and murder. Appellant appeals the judgment.

Discussion

Appellant's Statement

In his second issue, appellant contends that the trial court erred by denying his motion to suppress his oral statement made before being placed under arrest. In his third issue, appellant contends that the trial court erred by denying his motion to suppress his written statement relating that he stole and forged the deceased's checks and that on the night of the fire he was at the deceased's house and had a physical altercation with the deceased. These issues bear directly on appellant's complaints regarding the sufficiency of the evidence to support his convictions. Accordingly, they will be addressed at the outset. *See* Tex. R. App. P. 47.1.

Appellant challenges the court's findings that he was not in custody during the interview with Gilchrest and Roach before being arrested and that he was thus not entitled to the protections of *Miranda*, embodied in article 38.22 of the Texas Code of Criminal Procedure. *See generally* Tex. Code. Crim. Proc. Ann. art. 38.22 (West 1979); *see also Miranda v. Arizona*, 384 U.S. 436 (1966). We review *de novo* "mixed questions of law and fact" that do not turn on credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (citing *Villarreal v. State*, 935 S.W.2d 134, 139-41 (Tex. Crim. App. 1996) (McCormick, P.J. concurring)). We will review *de novo* the district court's legal determination that appellant was not in custody at the time of his pre arrest oral statements.

"A person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318 (1994)). The reasonable person test demands that the custody determination be based entirely upon objective circumstances. *Dowthitt*, 931 S.W.2d at 254. The court of criminal appeals has identified at least four general situations that may constitute custody: (1) when the suspect is physically deprived of his freedom of movement in any significant way; (2) when the suspect is told by a law enforcement officer that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) when probable cause to arrest exists and law enforcement officers do not tell the suspect that he is free to leave. *Id.* at 255. For the first three situations, the suspect's freedom of movement must be restricted to the degree associated with an arrest, as opposed to an investigative detention. *Id.* As for the fourth scenario, the subjective intent of law enforcement officials to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect, and that manifestation, combined with the other objective circumstances, would lead a reasonable person in the suspect's position to believe that he is under restraint to the degree associated with an arrest. *Id.*

After reviewing the record, we hold that appellant was not in custody at the time he made his pre arrest oral statements. Detective Gilchrest called appellant at his mother's home and asked if he would talk to them. The police picked him up there, and he voluntarily accompanied the police to the stationhouse. Appellant was not handcuffed during this time. He was never told he was being placed into custody. Nor is there any indication

appellant was not willing to accompany the authorities or not willing to talk to them. There is no indication on the record that appellant wanted to leave or tried to leave at the time he was making his oral statement. When a person voluntarily accompanies officers to a location and he knows or should know that he is a suspect in the crime the officers are investigating, the person is not in custody. *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex. Crim. App. 1985).

Appellant focuses his argument primarily on the fourth *Dowthitt* scenario, arguing that Gilchrest and Roach manifested probable cause by telling appellant that he was a suspect without expressly informing appellant that he was free to leave. Our review of the record does not convince us that the district court erred in determining that there was not a manifestation of probable cause during the course of the interview prior to the arrest. *See Roquemore v. State*, 60 S.W.2d 862, 866 (Tex. Crim. App. 2001) ("In reviewing a motion to suppress, we give great deference to a trial court's determination of historical facts.") (citing *Guzman*, 955 S.W.2d at 89). Appellant was merely asked specific questions during a continuing investigation. Although appellant probably understood he was a suspect, this is not itself determinative of the custody issue. *See Rodriguez v. State*, 939 S.W.2d 211, 216-17 (Tex. App.—Austin 1997, no pet.) ("Even a clear statement by an officer that the person under interrogation is the prime suspect is not in itself dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest."). A reasonable person in appellant's position would not have believed he was restrained to the degree associated with a formal arrest. Appellant was therefore not in custody when he made the pre arrest oral statements. *See Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (holding that suspect not in custody until formally arrested). Appellant's second issue is overruled.

In his third issue, appellant contends that his written statement should have been suppressed because it was tainted by his earlier oral statement. Relying on the "cat-out-of-the-bag" theory, which has been severely limited in its application, *see Griffin v. State*, 765 S.W.2d 422, 431 (Tex. Crim. App. 1989), appellant argues that because he thought his oral confession could be used against him, "his resolve to remain silent [was] broken, rendering any subsequent statements involuntary under the due process clause of the United States Constitution and Article 1 Section 9 of the Texas Constitution."

Making a statement under circumstances that preclude its use does not perpetually disable the confessor from making a usable one after those circumstances have been removed. *Griffen*, 765 S.W.2d at 428 (citing *United States v. Bayer*, 331 U.S. 532, 541 (1947)). We assess the effect of giving a statutorily inadmissible statement on the voluntariness of a subsequent statement from the totality of the circumstances, with the State bearing the burden of proving voluntariness by a preponderance of the evidence. *Id.* at 429-30; *In re J.T.H.*, 779 S.W.2d 954, 958 (Tex. App.—Austin 1989, no writ). Those circumstances include the "length of detention, incommunicado or prolonged detention, denying family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality." *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985). None of these factors is present in this case.

The record reflects that appellant's interrogation lasted around five hours; however, appellant does not contend and the record does not reflect that this period of time somehow rendered appellant's written confession involuntary as a matter of law. Appellant was repeatedly offered and given beverages, as well as food. While he never requested access to an attorney, he was informed, both orally and in writing, of his right to do so. The record further reflects that

Gilchrest informed appellant that he would be given an opportunity to contact his mother in light of the length of the interrogation:

[Detective] Gilchrest:	Let's take a break just a second.
[Agent] Roach:	You want another soda?
[Appellant]:	I still have a little bit.
[Detective] Gilchrest:	Ethridge, we're going to have to take a break. Let me take this opportunity to let you go to the bathroom and get you something else to drink.
[Appellant]:	Where do you stand in this proceeding time-wise?
[Detective] Gilchrest:	Time-wise?
[Appellant]:	Yeah.
[Detective] Gilchrest:	A lot of that just depends on where we go. If you want to call your mom and—in a little while, because if we want to going too long—
[Appellant]:	It's just about 7:30. We're still okay at this point.

Further, in addition to several express offers to take bathroom breaks, appellant was given an open ended offer to use the restroom at any time. After returning from a break early in the interrogation, the following exchange took place:

[Detective] Gilchrest:	I feel much better now.
[Appellant]:	I'm not far away from [using the restroom] myself. That's the way that (indistinguishable) is.
[Agent] Roach:	Oh, just holler. Holler whenever you need to.

Under the totality of the circumstances, the record supports the trial court's subsequent ruling:

> The written confession is admissible. The defendant was read his rights, the full rights, before giving the written statement after he was properly warned with the written statement. The, there is, there was some question I believe concerning, there's a question concerning the totality of the circumstances test and the defendant believing that his prior statement would be used against him. I don't know. There's just some other notes that I've taken but it really doesn't have anything to do with the holding. Has to do more with rationale. I do find that with all the warnings that he did receive, both the oral warnings and the written warnings, and the totality of the circumstances, the written statement was voluntary.
>
> I do not find the defendant's statements were the product of coercion. The written warnings cured the omission of the oral warning, or the one omission if there was an oral warning.

In the absence of specific evidence that the oral statement played an actual role in appellant's decision to sign a written one, we cannot fault the trial court for its finding. *See Griffen*, 765 S.W.2d at 431; *see also Guardiola v. State*, 20 S.W.3d 216, 223-24 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Appellant does not dispute that the statutory requisites for the admission of the written statement were satisfied. *See* Tex. Code Crim. Proc. Ann. art. 38.22 § 2(a) (West 1979). Instead, he contends that Gilchrest "erroneously told Appellant that the written warnings basically consisted of the same, imperfect, warnings he had recited to Appellant earlier." However, appellant does not cite, and we are unaware of, authority for the proposition that such a statement renders statutorily adequate warnings on a

written statement ineffective. Because a written statement is not "obtained" (because it is not admissible) until it is signed, giving the required warnings before the accused signs the statement meets the statutory requirements. *See Dowthitt v. State*, 931 S.W.2d 244, 259 (Tex. Crim. App. 1996).

Appellant further contends that because Gilchrest immediately reduced appellant's oral statements to writing, there was "a direct connection between the prior inadmissible statement and the subsequent written statement." However, the record reflects that appellant carefully read and edited his written statement, contemplated his choice of words, and changed his written statement to more accurately reflect his impression of the events in question. In light of this period of time for reflection and the totality of the circumstances surrounding appellant's written statement, including the unchallenged written warnings on that statement, we hold that whatever "direct connection" existed between his oral and written statement does not render the written statement inadmissible.

Finally, appellant refers to his testimony that "he would not have signed the written statement had he not made the exact same oral statements moments earlier . . . [and] had he known his earlier oral statement was not admissible because of the fatally defective statutory warning given to him." Because this resolution of the "application of law to fact questions" turns on an evaluation of appellant's credibility and demeanor, we will defer to the trial court's ruling. *See Guzman*, 955 S.W.2d at 89. The conflicts between appellant's testimony at the suppression hearing and those portions of the record reflecting that he gave his written statement voluntarily were decided by the trial court in favor of the State. The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Villarreal*, 935 S.W.2d at 138. We hold

that the trial court did not err in admitting appellant's written statement into evidence. Accordingly, appellant's third issue is overruled.

Hearsay Evidence

In his fourth issue, appellant contends that the trial court erred by admitting the hearsay testimony of Anthony Yates and Evelyn Whiteley. Because this issue also bears directly on appellant's sufficiency of the evidence complaints, we will address it prior to appellant's first issue.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court. *Jackson v. State*, 575 S.W.2d 567, 570 (Tex. Crim. App. 1979). An appellate court may reverse a trial court's decision for an abuse of discretion only when it appears that the court applied an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion. *Dubose v. State*, 915 S.W.2d 493, 497-98 (Tex. Crim. App. 1996). Even if the appellate court would have reached a different result, it should not intercede as long as the trial court's ruling was within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Appellant objected to Yates's and Whiteley's testimony concerning their conversations with the deceased as hearsay. *See* Tex. R. Evid. 802. The state responded that the testimony was admissible as a hearsay exception under Rule 803(3), which allows admission of a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, or bodily health. *Id.* 803(3).

The record reflects that the trial court overruled appellant's hearsay objection to Yates's testimony about the deceased's plans to evict appellant, change the locks on his house, and install deadbolts. The court further overruled

appellant's hearsay objection to Whiteley's testimony that the deceased planned to pursue check charges against appellant and change the locks on his house, as well as the deceased's "state of mind about wanting to make sure the defendant was out of there before he filed [check forging charges] on him."

Rule 803(3) clearly provides that testimony as to the deceased's plan and then existing state of mind is admissible. *See id.* Because the complained of testimony concerns the deceased's plans to evict appellant, change his locks, file charges against appellant, as well as his state of mind concerning when he would file charges against appellant, it is relevant as probative of a material issue.[1] Thus, we cannot say that the court applied an erroneous legal standard or that no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion. Further, we cannot say that the court's decision does not lie within the zone of reasonable disagreement. Accordingly, appellant's fourth issue is overruled.

Sufficiency of the Evidence

In his first issue, appellant challenges the legal and factual sufficiency of the evidence to support his convictions

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[1] In his motion for rehearing, appellant argues that his objections to the testimony was based partly on relevance grounds, that it "was not probative of any material issue in the cases . . . regardless of whether it avoided exclusion as hearsay because it was a statement of existing mental condition." While we find that the testimony was in fact probative to the extent required by rule 803(3), it remains unclear as to whether appellant also complains that the testimony was not relevant pursuant to article IV of the rules of evidence. *See* Tex. R. Evid. 402. If article IV is at issue, we note that neither appellant's brief nor his motion for rehearing cites us to that portion of the rules or any caselaw discussing the law of relevancy. Thus, we will not further discuss it. *See* Tex. R. App. P. 38.1(h).

for arson and murder. Specifically, appellant contends that the evidence is legally and factually insufficient to "establish beyond a reasonable doubt the *corpus delecti* required in an arson prosecution, i.e., that the fire was set deliberately." Appellant's argument assumes that his written statement was invalid and that the trial court erred by admitting Yates's and Whiteley's testimony. In any event, we review the legal sufficiency of the evidence based upon the evidence admitted, even if on appeal we determine that the evidence is inadmissible. *Miles v. State*, 918 S.W.2d 511, 512 (Tex. Crim. App. 1996).

Determining the legal and factual sufficiency of the evidence requires the implementation of separate and distinct legal standards. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). A legal sufficiency review calls upon the reviewing court to view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994). Any inconsistencies in the evidence should be resolved in favor of the verdict. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). This standard of review is the same for both direct and circumstantial evidence. *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992).

Viewing the evidence in the light most favorable to the verdicts, the record reflects that the jury could have concluded that appellant went to the deceased's house at around 3:00 a.m. on the morning of the fire, struck the deceased in the face with a blunt instrument causing injuries severe enough to render him unconscious, turned on two of the gas burners on the stove in the deceased's kitchen, and held an open flame causing the origin of the fire. The jury could have concluded further that appellant parked down the street from the deceased's home and

moved the deceased's vehicle so that neighbors and firefighters would think the deceased was not at home. In light of the standards set out above, we cannot say that any rational trier of fact could not have found the essential elements of arson and murder beyond a reasonable doubt.

In determining the factual sufficiency of the elements of the offense, the reviewing court views all the evidence in a neutral light, without the prism of "in the light most favorable to the prosecution." *Johnson*, 23 S.W.3d at 6-7. The court reviews *all* the evidence impartially, comparing evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute with the evidence that tends to disprove the fact. *Id.* at 7. In conducting its factual sufficiency review, an appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). However, it must be remembered that the trier of fact is the sole judge of the weight and credibility of the testimony. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). The court, thus, does not substitute its judgment for that of the jury, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 129. Furthermore, the appellate court may not reverse a jury's decision simply because it disagrees with the result. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

Appellant argues that the testimony given by his expert was such that the State's cases for arson and murder must fail in a factual sufficiency analysis. However, the record does not reflect any evidence tending to disprove the fact that the fire was set deliberately; appellant's expert witness testified that the cause of the fire was probably not a smoldering cigarette, but most likely an open flame. In light of appellant's written statement and the testimony of Yates and Whiteley, the jury was free to consider

appellant's prior relationship with the deceased; the fact that when he went to the deceased's home appellant parked down the street from the home rather than in the driveway or in front of the house; the fact that appellant moved the deceased's truck out of his driveway so that it would not be seen and reveal the deceased's presence at the house; the fact that appellant left Austin for Maryland later the same morning; and the fact that appellant lied to police about stealing and forging the deceased's checks and being at the deceased's home and having a physical altercation with the deceased on the morning of the fire.

Appellant complains that, in order to find he deliberately started the fire, there must be an impermissible stacking of inferences "unrelated to the physical evidence of the timing and nature of the ignition of the fatal fire . . . ." In support of this proposition, appellant directs us only to *Tippit v. State*, 41 S.W.3d 316, 327 (Tex. App.—Ft. Worth 2001, no pet.), which stated that "when conducting a *legal sufficiency* review, a vital fact may not be established by stacking inference upon inference." Without any authority, we are unwilling to agree with appellant that making factual inferences based on circumstantial evidence "cannot be anymore permissible when reviewing the factual sufficiency of the jury's verdicts." *See* Tex. R. App. P. 38.1(h).

Thus, after examining *all* of the evidence impartially and giving deference to the jury's verdict, we conclude that the jury's verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Moreover, from our neutral review of all of the evidence weighed by the jury that tends to prove that the fire was set deliberately and comparing it with the evidence that tends to disprove that fact, we find it fails to show that the proof of appellant's guilt is so obviously weak as to undermine confidence in the jury's determination, or that the proof of guilt, although adequate if taken alone, is greatly outweighed by the contrary proof.

Because the record reflects both legally and factually sufficient evidence to support the jury's verdicts, appellant's first issue is overruled.

Motion for New Trial

In his fifth and final issue, appellant contends that the trial court abused its discretion by denying his motion for new trial. Specifically, appellant contends that he was entitled to a new trial because one of the jurors stated during deliberations that a statistical analysis demonstrated that the likelihood that the fire at the deceased's home started accidentally was "so slight as to be almost impossible."

The grant or denial of a motion for new trial is committed to the sound discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). Abuse of discretion occurs when the trial court's decisions is arbitrary or unreasonable. *State v. Read*, 965 S.W.2d 74, 77 (Tex. App.—Austin 1998, no pet.). A trial court abuses its discretion "only when the . . . decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). The question is "whether the trial court acted without reference to any guiding rules or principles." *Montgomery*, 810 S.W.2d at 380. We presume the correctness of the trial court's ruling, and the burden rests on the appellant to establish the contrary. *State v. Gill*, 967 S.W.2d 540, 541 (Tex. App.—Austin 1998, pet. ref'd). The court's decision will be sustained if it is correct on any theory of law applicable to the case. *Read*, 965 S.W.2d at 77.

Appellant contends that he was entitled to a new trial because the juror's statements regarding statistical analysis constituted receipt of other evidence during deliberations. Texas Rule of Evidence 606(b) limits those matters on which a juror may testify concerning deliberation to: "(1)

whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve." Tex. R. Evid. 606(b). Accordingly, we interpret appellant's contention as complaining of outside influence.

Although case law has not specifically defined what constitutes "outside influence," it provides ample guidance as to what conduct is *not* considered an outside influence. *Hines v. State*, 3 S.W.3d 618, 623 (Tex. App.—Texarkana 1999, pet. ref'd). Outside influences must originate from sources other than the jury itself. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370 (Tex. 2000). An outside influence is a force external to the jury and its deliberations, and it does not include any part of the jury's mental process. *Wooten v. Southern Pac. Transp. Co.*, 928 S.W.2d 76, 78-79 (Tex. App.—Houston [14th Dist.] 1995, no writ). It "does not include information acquired by a juror and communicated to the others between the time the trial court instructs the jury and the time it renders a verdict, even when the information is not in evidence, and it is unknown to jurors before trial." *Crowson v. Kansas City S. Ry. Co.*, 11 S.W.3d 300, 305 (Tex. App.—Eastland 1999, no pet.). Information gathered by one juror and related to the other jurors does not constitute outside influence, even if introduced specifically to prejudice the vote. *Soliz v. Saenz*, 779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, writ denied).

In this case, the juror's claim that a statistical analysis revealed that the fire was not likely to have been accidental did not constitute an outside influence because it did not come from a source outside the jury, it involved the mental processes of a juror, and it did not emanate from outside the jury and its deliberations. In light of the standards set out above, we cannot say that the trial court abused its discretion in denying appellant's motion for new trial. Accordingly, his fifth issue is overruled.

Conclusion

We overrule appellant's issues. Accordingly, the judgment of the trial court is affirmed.

Marilyn Aboussie, Chief Justice

Before Chief Justice Aboussie, Justices Yeakel and Puryear
Affirmed
Filed: December 5, 2002
Do Not Publish

APPENDIX D

COURT OF APPEALS OF TEXAS, AUSTIN

WILLIAM ETHRIDGE HILL, JR., APPELLANT
v.
THE STATE OF TEXAS, APPELLEE

NOS. 03-01-00232-CR, 03-01-00233-CR

August 30, 2002

Before Chief Justice ABOUSSIE, Justices YEAKEL and PURYEAR.

MARILYN ABOUSSIE, Chief Justice.

Appellant William Ethridge Hill, Jr., brings this consolidated appeal from his convictions for arson and murder. *See* Tex. Pen. Code Ann. §§ 19.02; 28.02 (West 1994 & Supp. 2002). In five issues, appellant contends that (1) the evidence is legally and factually insufficient to support his convictions; (2) the trial court erred by admitting appellant's oral statement; (3) the trial court erred by admitting appellant's written statement; (4) the trial court erred by admitting hearsay evidence; and (5) the trial court abused its discretion by denying appellant's motion for new trial. We will affirm the judgment of the trial court.

BACKGROUND

In the early morning hours of October 2, 1997, the Austin Fire Department received an alarm concerning a fire at the residence of William Allen. Allen's badly burned body was discovered in the house, and the medical examiner determined that he had suffered a severe blow to his face

which rendered him unconscious before his death. The medical examiner concluded that Allen died of smoke inhalation and ruled the case a homicide.

Lieutenant Michael Crabill, an arson investigator, determined that the point of origin of the fire was in the living room, in the southeast corner, in and around a reclining chair. He also determined that the fire was started by an open flame. Further, firefighters noted that two gas burners on the stove in the kitchen had been turned to the "on" position. Neighbors and firefighters did not realize the deceased was in the burning house because his vehicle was not parked in his driveway. In a statement to police, appellant later admitted that he moved the deceased's vehicle down the street on the morning of the fire.

Detective Mark Gilchrest of the Austin Police Department began an investigation and discovered that the deceased had a roommate who had recently moved out of the house. Appellant was identified as the roommate. Billy Gene Harris, a neighbor of the deceased, testified that at 3:00 a.m. on the morning of October 2, 1997, he saw a person matching appellant's description get out of a car parked down the street from the deceased's house. Harris saw this individual walk toward the deceased's house and return to his vehicle about twenty minutes later. Neighbors discovered the fire coming out of the deceased's house at approximately 3:45 a.m.

Detective Gilchrest met with some of appellant's acquaintances and learned that he left Austin on the day of the fire to visit his mother in the Washington, D.C. area. As a result of his investigation, Gilchrest also determined that appellant had recently stolen and forged several of the deceased's checks and that the deceased had planned to file charges against appellant.

On October 10, Gilchrest contacted appellant at his mother's home, asked him if he planned to return to Austin, and told him that they needed to talk further. Gilchrest also made arrangements to meet with FBI agent Ed Roach in Montgomery County, Maryland, to set up an interview with appellant.

On October 28, appellant voluntarily met with Gilchrest and Roach at the Montgomery County Police Department. During this meeting, appellant initially denied but subsequently admitted stealing and forging the deceased's checks, being present at the deceased's house on the morning of the fire, and engaging in a physical altercation with the deceased shortly before the fire. Appellant was arrested and indicted for arson and murder.

On February 7, 2001, the trial court rendered judgment on a jury verdict convicting appellant of arson and murder. Appellant appeals the judgment.

DISCUSSION

Appellant's Written Statement

In his third issue, appellant contends that the trial court erred by denying his motion to suppress his written statement relating that he stole and forged the deceased's checks and that on the night of the fire he was at the deceased's house and had a physical altercation with the deceased. This issue bears directly on appellant's complaints regarding the sufficiency of the evidence to support his convictions and the trial court's denial of his motion to suppress his oral statement. Accordingly, we will address his third issue at the outset. *See* Tex. R. App. P. 47.1.

Specifically, appellant contends that his written statement was inadmissible because he would not have given it but for his earlier oral statement. Assuming

without deciding that appellant's oral statement was inadmissible,[1] we disagree.

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). In this review, we defer to the district court's factual determinations but review de novo the court's application of the law to the facts. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

Appellant contends that his written statement should have been suppressed because it was tainted by his earlier oral statement. Relying on the "cat-out-of-the-bag" theory, which has been severely limited in its application, *see Griffen v. State*, 765 S.W.2d 422, 431 (Tex. Crim. App. 1989), appellant argues that because he thought his oral confession could be used against him, "his resolve to remain silent [was] broken, rendering any subsequent statements involuntary under the due process clause of the United States Constitution and Article 1 Section 9 of the Texas Constitution."

Making a statement under circumstances that preclude its use does not perpetually disable the confessor from making a usable one after those circumstances have been removed. *Griffen*, 765 S.W.2d at 428 (citing *United States v. Bayer*, 331 U.S. 532, 541, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947)). We assess the effect of giving a statutorily inadmissible statement on the voluntariness of a subsequent statement from the totality of the circumstances, with the State bearing the burden of proving voluntariness by a preponderance of the evidence. *Id.* at 429-30; *In re J.T.H.*, 779 S.W.2d 954, 958 (Tex.App.—Austin

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[1] The trial court held that while Gilchrest's warnings to appellant did not comply with applicable constitutional standards, appellant's oral statement that he was at the deceased's house on the morning of the fire was admissible because appellant was not in custody at the time he made the statement.

1989, no writ). Those circumstances include the "length of detention, incommunicado or prolonged detention, denying family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality." *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985). None of these factors is present in this case.

The record reflects that appellant's interrogation lasted around five hours; however, appellant does not contend the record does not reflect that this period of time somehow rendered appellant's written confession involuntary as a matter of law. Appellant was repeatedly offered and given beverages, as well as food. While he never requested access to an attorney, he was informed both orally and in writing, of his right to do so. The record further reflects that Gilchrest informed appellant that he would be given an opportunity to contact his mother in light of the length of the interrogation.

[Detective] Gilchrest:	Let's take a break just a second.
[Agent] Roach:	You want another soda?
[Appellant]:	I still have a little bit.
[Detective] Gilchrest:	Ethridge, we're going to have to take a break. Let me take this opportunity to let you go to the bathroom and get you something else to drink.
[Appellant]:	Where do you stand in this proceeding time-wise?
[Detective] Gilchrest:	Time-wise?
[Appellant]:	Yeah.
[Detective] Gilchrest:	A lot of that just depends on where we go. If you want to call your mom and—in a little while, because if we get to going too long—

[Appellant]: It's just about 7:30. We're still okay at this point.

Further, in addition to several express offers to take bathroom breaks, appellant was given an open ended offer to use the restroom at any time. After returning from a break early in the interrogation, the following exchange took place:

[Detective] Gilchrest: I feel much better now.

[Appellant]: I'm not far away from [using the restroom] myself. That's the way that (indistinguishable) is.

[Agent] Roach: Oh, just holler. Holler whenever you need to.

Under the totality of the circumstances, the record supports the trial court's subsequent ruling:

> The written confession is admissible. The defendant was read his rights, the full rights, before giving the written statement after he was properly warned with the written statement. The, there is, there was some question I believe concerning, there's a question concerning the totality of the circumstances test and the defendant believing that his prior statement would be used against him. I don't know. There's just some other notes that I've taken but it really doesn't have anything to do with the holding. Has to do more with rationale. I do find that with all the warnings that he did receive, both the oral warnings and the written warnings, and the totality of the circumstances, the written statement was voluntary.
>
> I do not find the defendant's statements were the product of coercion. The written warnings cured the omission of the oral warning, or the one omission if there was an oral warning.

In the absence of specific evidence that the oral statement played an actual role in appellant's decision to

sign a written one, we cannot fault the trial court for its finding. *See Griffen*, 765 S.W.2d at 431; *see also Guardiola v. State*, 20 S.W.3d 216, 223-24 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Appellant does not dispute that the statutory requisites for the admission of the written statement were satisfied. *See* Tex. Code Crim. Proc. Ann. art. 38.22 § 2(a) (West 1979). Instead, he contends that Gilchrest "erroneously told Appellant that the written warnings basically consisted of the same, imperfect, warnings he had recited to Appellant earlier." However, appellant does not cite, and we are unaware of, authority for the proposition that such a statement renders statutorily adequate warnings on a written statement ineffective. Because a written statement is not "obtained" (because it is not admissible) until it is signed, giving the required warnings before the accused signs the statement meets the statutory requirements. *See Dowthitt v. State*, 931 S.W.2d 244, 259 (Tex. Crim. App. 1996).

Appellant further contends that because Gilchrest immediately reduced appellant's oral statements to writing, there was "a direct connection between the prior inadmissible statement and the subsequent written statement." However, the record reflects that appellant carefully read and edited his written statement, contemplated his choice of words, and changed his written statement to more accurately reflect his impression of the events in question. In light of this period of time for reflection and the totality of the circumstances surrounding appellant's written statement, including the unchallenged written warnings on that statement, we hold that whatever "direct connection" existed between his oral and written statement does not render the written statement inadmissible.

PUBLISHER'S NOTE:

Page 35a is missing in original document.

Tex. R. App. P. 44.2(b).[2] Accordingly, his second issue is overruled.

Hearsay Evidence

In his fourth issue, appellant contends that the trial court erred by admitting the hearsay testimony of Anthony Yates and Evelyn Whiteley. Because this issue also bears directly on appellant's sufficiency of the evidence complaints, we will address it prior to appellant's first issue.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court. *Jackson v. State*, 575 S.W.2d 567, 570 (Tex. Crim. App. 1979). An appellate court may reverse a trial court's decision for an abuse of discretion only when it appears that the court applied an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion. *Dubose v. State*, 915 S.W.2d 493, 497-98 (Tex. Crim. App. 1996). Even if the appellate court would have reached a different result, it should not intercede as long as the trial court's ruling was within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Appellant objected to Yates's and Whiteley's testimony concerning their conversations with the deceased as

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[2] Appellant contends that the harm flowing from the admission of his oral and written statements should be analyzed pursuant to Rule of Appellate Procedure 44.2(a) because "*Miranda* warnings are of constitutional dimension, *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2002), and the warnings required by Article 38.22 are likewise of constitutional dimension as they insure the effectuation of the federal and Texas guarantees to be free from compelled self-incrimination." Appellant does not dispute that the statutory requisites for the admission of his written statement were satisfied; accordingly, we review any theoretical resulting harm under Rule 44.2(b).

hearsay. *See* Tex. R. Evid. 802. The state responded that the testimony was admissible as a hearsay exception under Rule 803(3), which allows admission of a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, or bodily health. *Id.* 803(3).

The record reflects that the trial court overruled appellant's hearsay objection to Yates's testimony about the deceased's plans to evict appellant, change the locks on his house, and install deadbolts. The court further overruled appellant's hearsay objection to Whiteley's testimony that the deceased planned to pursue check charges against appellant and change the locks on his house, as well as the deceased's "state of mind about wanting to make sure the defendant was out of there before he filed [check forging charges] on him."

Rule 803(3) clearly provides that testimony as to the deceased's plan and then existing state of mind is admissible. *See id.* Because the complained of testimony concerns the deceased's plans to evict appellant, change his locks, file charges against appellant, as well as his state of mind concerning when he would file charges against appellant, we cannot say that the court applied an erroneous legal standard or that no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion. Further, we cannot say that the court's decisions does not lie within the zone of reasonable disagreement. Accordingly appellant's fourth issue is overruled.

Sufficiency of the Evidence

In his first issue, appellant challenges the legal and factual sufficiency of the evidence to support his convictions for arson and murder. Specifically, appellant contends that the evidence is legally and factually insufficient to

"establish beyond a reasonable doubt the *corpus delecti* required in an arson prosecution, i.e., that the fire was set deliberately." Appellant's argument assumes that his written statement was invalid and that the trial court erred by admitting Yates's and Whiteley's testimony. We have found that the statement was valid and that the trial court did not abuse its discretion in admitting Yates's and Whiteley's testimony. In any event, we review the legal sufficiency of the evidence based upon the evidence admitted, even if on appeal we determine that the evidence is inadmissible. *Miles v. State*, 918 S.W.2d 511, 512 (Tex. Crim. App. 1996).

Determining the legal and factual sufficiency of the evidence requires the implementation of separate and distinct legal standards. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). A legal sufficiency review calls upon the reviewing court to view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994). Any inconsistencies in the evidence should be resolved in favor of the verdict. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). This standard of review is the same for both direct and circumstantial evidence. *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992).

In determining the factual sufficiency of the elements of the offense, the reviewing court views all the evidence in a neutral light, without the prism of "in the light most favorable to the prosecution." *Johnson*, 23 S.W.3d at 6-7. The court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact. *Id.* In conducting its factual sufficiency review,

an appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). The court, however, does not substitute its judgment for that of the jury, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* at 129. Furthermore, the appellate court may not reverse a jury's decision simply because it disagrees with the result. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

Viewing the evidence in the light most favorable to the verdicts, the record reflects that the jury could have concluded that appellant went to the deceased's house at around 3:00 a.m. on the morning of the fire, struck the deceased in the face with a blunt instrument causing injuries severe enough to render him unconscious, turned on two of the gas burners on the stove in the deceased's kitchen, and held an open flame causing the origin of the fire. The jury could have concluded further that appellant parked down the street from the deceased's home and moved the deceased's vehicle so that neighbors and firefighters would think the deceased was not at home. In light of the standards set out above, we cannot say that any rational trier of fact could not have found the essential elements of arson and murder beyond a reasonable doubt.

Further, after reviewing the evidence weighed by the jury that tends to prove that the fire was set deliberately and comparing it with the evidence that tends to disprove that fact, we cannot say that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The record does not reflect any evidence tending to disprove the fact that the fire was set deliberately; appellant's expert witness testified that the cause of the fire was probably not a smoldering cigarette, but most likely an open flame. In light of appellant's written statement and the testimony of Yates and Whiteley,

the jury was free to consider appellant's prior relationship with the deceased; the fact that when he went to the deceased's home appellant parked down the street from the home rather than in the driveway or in front of the house; the fact that the appellant moved the deceased's truck out of his driveway so that it would not be seen and reveal the deceased's presence at the house; the fact that appellant left Austin for Maryland later the same morning; and the fact that appellant lied to police about stealing and forging the deceased's checks and being at the deceased's home and having a physical altercation with the deceased on the morning of the fire. Because the record reflects both legally and factually sufficient evidence to support the jury's verdicts, appellant's first issue is overruled.

Motion for New Trial

In his fifth and final issue, appellant contends that the trial court abused its discretion by denying his motion for new trial. Specifically, appellant contends that he was entitled to a new trial because one of the jurors stated during deliberations that a statistical analysis demonstrated that the likelihood that the fire at the deceased's home started accidentally was "so slight as to be almost impossible."

The grant or denial of a motion for new trial is committed to the sound discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). Abuse of discretion occurs when the trial court's decisions is arbitrary or unreasonable. *State v. Read*, 965 S.W.2d 74, 77 (Tex. App.—Austin 1998, no pet.). A trial court abuses its discretion "only when the . . . decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). The question is "whether the trial court acted without reference to any guiding rules or principles." *Montgomery*, 810 S.W.2d at 380. We presume the

correctness of the trial court's ruling, and the burden rests on the appellant to establish the contrary. *State v. Gill*, 967 S.W.2d 540, 541 (Tex. App.—Austin 1998, pet. ref'd). The court's decision will be sustained if it is correct on any theory of law applicable to the case. *Read*, 965 S.W.2d at 77.

Appellant contends that he was entitled to a new trial because the juror's statements regarding statistical analysis constituted receipt of other evidence during deliberations. Texas Rule of Evidence 606(b) limits those matters on which a juror may testify concerning deliberation to: "(1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve." Tex. R. Evid. 606(b). Accordingly, we interpret appellant's contention as complaining of outside influence.

Although case law has not specifically defined what constitutes "outside influence," it provides ample guidance as to what conduct is *not* considered an outside influence. *Hines v. State*, 3 S.W.3d 618, 623 (Tex. App.—Texarkana 1999, pet. ref'd). Outside influences must originate from sources other than the jury itself. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370 (Tex. 2000). An outside influence is a force external to the jury and its deliberations, and it does not include any part of the jury's mental process. *Wooten v. Southern Pac. Transp. Co.*, 928 S.W.2d 76, 78-79 (Tex. App.—Houston [14th Dist.] 1995, no writ). It "does not include information acquired by a juror and communicated to the others between the time the trial court instructs the jury and the time it renders a verdict, even when the information is not in evidence, and it is unknown to jurors before trial." *Crowson v. Kansas City S. Ry. Co.*, 11 S.W.3d 300, 305 (Tex. App.—Eastland 1999, no pet.). Information gathered by one juror and related to the other jurors does not constitute outside influence, even if introduced specifically to prejudice the vote. *Soliz v. Saenz*,

779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, writ denied).

In this case, the juror's claim that a statistical analysis revealed that the fire was not likely to have been accidental did not constitute an outside influence because it did not come from a source outside the jury, it involved the mental processes of a juror, and it did not emanate from outside the jury and its deliberations. In light of the standards set out above, we cannot say that the trial court abused its discretion in denying appellant's motion for new trial. Accordingly, his fifth issue is overruled.

CONCLUSION

We overrule appellant's issues. Accordingly, the judgment of the trial court is affirmed.

APPENDIX E

CAUSE NOS. 98-1472 and 98-1493

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
V.	§	OF TRAVIS COUNTY, TEXAS
	§	
WILLIAM ETHRIDGE	§	
HILL, JR.	§	331ST JUDICIAL DISTRICT

VOLUME II OF 9

Trial on the Merits

January 9, 2001

* * * * *

interview room that was taken of him in Baltimore, Maryland. And I want to offer that tape into evidence, Judge. It is the only copy that I've got. If the state's got another copy I'd like to introduce it.

What the relevant period or information on that tape, Judge, is that during that conversation Mr. Hill and Detective Gilchrest had a conversation about an attorney in Austin by the name of Dan Covich. And Mr. Hill tells Detective Gilchrest that Dan Covich is his lawyer. And it's at the very end of the tape. I would like to offer that as an additional exhibit for this hearing. I guess I could mark it as Defendant's I guess Exhibit 1 for today's hearing and offer that into evidence.

THE COURT: All right. Well, I think what I need to do first, all my rulings are based on what I already seen before. So I need to go ahead and put them in the record first and then after that if you all want to move to reopen or whatever we can take that up.

MR. LEAVITT: That would be fine.

THE COURT: The court had held, holds that the defendant was voluntarily at the station house with the officers up until he was told he would be arrested; that the warnings given by Gilchrest did not comply with 38.22, that it was not substantial compliance; however, since the defendant was not in custody until they told him that he would be arrested made no difference that up until that arrest point that those first warnings were invalid.

The written confession is admissible. The defendant was read his rights, the full rights, before giving the written statement after he was properly warned with the written statement. The, there is, there was some question I believe concerning, there's a question concerning the totality of the circumstances test and the defendant believing that his prior statement would be used against him. I don't know.

That's just some other notes that I've taken but it really doesn't have anything to do with the holding. Has to do more with rationale. I do find that with all the warnings that he did receive, both the oral warnings and the written warnings, and the totality of the circumstances, the written statement was voluntary.

I do not find the defendant's statements were the product of coercion. The written warnings cured the omission of the oral warning, or the one omission if there was an oral warning.

I do find that Texas warrant did give the police probable cause to hold the defendant until a Maryland fugitive warrant could be issued, which was done and executed immediately after the interview was over. I do find also that there were exigent circumstances to hold the defendant once interrogation had occurred and once the defendant was told of the credit card abuse warrant. I don't see any way that they would have released the defendant who could easily flee because he knew he would be arrested for b h offenses.

There was some question that I had about this, and I don't remember now if we ever really decided this or not. But there was this question about whether article 14.04 applied in Maryland. I was thinking that there had been a Montana case or something like that where they did hold that Texas Code of Criminal Procedure article would still be applicable to Texas officers up there in Montana? Isn't that right? My recollection. I do note that the defendant had already left Texas at the time of the interview. So I think that was the warrant I think would justify that arrest.

And then I think there was an eighth point in the brief or something about, there was a question raised whether or not the arrest by Gilchrest or any other officer would be valid. And I do find that it was valid. That's basically based on that Texas warrant. It's been several months since we

discussed this, so I don't remember this as well as I did back when we were talking about it before. Okay.

Now, that was the question that you had, Mr. Leavitt, on the issue about the telephone call made beforehand?

MR. LEAVITT: Your Honor, I would like to reopen and reurge and admit further evidence and ask the Court to reconsider its rulings based on the fact the defendant had counsel Sixth Amendment right had been invoked, and Gilchrest, police officer, did interrogate him, knew that at the time prior to the time that he traveled to Baltimore, Maryland, and picked up the defendant on the ruse that he did and took him down to the police station, albeit he did ask him to come along voluntarily, the defendant complied, all along while the officer had a warrant for his arrest in his back pocket. And the plan was to arrest him if the defendant chose not to go down to the police station. We want to offer that tape, the telephone conversation made with the defendant by the Detective on October the 10th of 1997.

THE COURT: All right. What there is in the tape is you're saying at the end of the conversation he states that his attorney is this attorney here from Austin?

MR. LEAVITT: Yes, sir.

THE COURT: Okay, And when Gilchrest * * * .

* * * * *

opening statement with the Court's permission to go into those matters without waiving any claim that we still have pending here before the Court.

THE COURT: Okay, All right. Anything else?

MR. LEAVITT: That's all we have.

THE COURT: Okay. Go ahead and bring the jury in, please.

THE COURT: In terms of the statement that you were talking about, Randy, the Court's ruling the part that they

could get in on the oral statement was just the part, the initial thing before they got to the confession and everything, right, up until --

MR. LEAVITT: Up until the point in time they told him he was under arrest, is what you previously ruled.

THE COURT: So the rest of the video statement is --

MR. LEAVITT: Is suppressed.

THE COURT: Is suppressed, right.

(In the presence of the jury:)

THE COURT: Morning, ladies and gentlement of the jury, I think we're now ready to proceed. And the first order of business is for the state to read the indictments in these two cases and then for the * * * .

APPENDIX F

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

9/22/2004

COA#:03-01-00232-CR

RE: Case No. PD-2088-03

STYLE: HILL, WILLIAM ETHERIDGE, JR.

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

3rd Court of Appeals Clerk
Diane O'Neal
Inter-Agency Mail: P.O. Box 12547
Austin, TX 78711

APPENDIX G

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

9/22/2004
COA#:03-01-00233-CR
RE: Case No. PD-2089-03
STYLE: HILL, WILLIAM ETHERIDGE, JR.

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

3rd Court of Appeals Clerk
Diane O'Neal
Inter-Agency Mail: P.O. Box 12547
Austin, TX 78711

(2)

No. 04-854

Supreme Court, U.S.
FILED
APR 28 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM ETHRIDGE HILL, JR.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Judicial District

---

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The central question presented is whether a written warning and advisement of rights, administered prior to Hill's signing his written confession, when coupled with the earlier incomplete oral recitation of *Miranda* rights, "effectively comply with *Miranda's* constitutional requirement" that a confession be voluntarily given. The answer is "yes" because the earlier recitation of *Miranda* rights to Hill focused his attention on the gravity of his situation and the significance of any statements he might make. That the earlier recitation, standing alone, would be insufficient to pass *Miranda's* bright-line rule determining admissibility of custodial statements is not relevant to the narrower issue before the Court.

The record in the present case establishes the correctness of this proposition and demonstrates that Hill possessed a keen

awareness of the legal consequences of talking with police officers. Evidence that Hill understood his legal position is manifested in the fact that after he orally received *Miranda* rights he steadfastly denied, for over two hours, that he was present at the decedent's home the night of the crime.

While the good or bad faith of police officers who fail to fully advise a suspect of constitutional rights is, theoretically, divorced from whether subsequent *Miranda* admonitions are effective in apprising the suspect of his constitutional rights, bad faith violations call for broader application of the Fifth Amendment exclusionary rule. Hill's insinuation that Gilcrest, in his oral admonishment, intentionally omitted one component in order to obtain a confession does not withstand objective analysis. If Detective Gilcrest had intended to lead Hill astray regarding his *Miranda* rights, he would not have advised Hill of the continuing right to remain silent, to terminate the interview, and to the assistance of counsel. These rights are the backbone of *Miranda*, and serve to focus a suspect's decision-making regarding the degree to which he reveals information to authorities.

STATE'S REPLY

Since Detective Gilchrest orally advised Hill of his continuing right to silence under the Fifth Amendment prior to eliciting incriminating admissions, as a matter of law the two-step interrogation technique was not used. Therefore, *Missouri v. Seibert* does not apply to the present case. Further, the subsequent written warnings effectively conveyed Hill's right to remain silent.

A. *Miranda* warnings were effective as a matter of law.

The complete administration of *Miranda* admonitions has become the *sine qua non* of voluntariness review, dispensing with analysis of the actual state of mind of the confessing

individual. Part of the reason for this is the sheer ease of application of this rule. For all practical purposes, warned statements are admissible and unwarned ones are not, regardless of the actual degree of self-determination possessed by the suspect.

This bright-line simplicity was challenged in *Oregon v. Elstad*, 470 U.S. 298 (1985), but the Court rejected that challenge. This Court held that a properly admonished confession satisfied *Miranda* even though it followed a custodial admission made without the benefit of *Miranda* admonitions, as long as the prior unwarned admission was voluntarily made. The Court reasoned that a suspect should not be deemed incapable of voluntarily admitting to a crime due to a prior fortuitous failure by the police to administer *Miranda* warnings. The Court thereby shunned adopting an abstract psychological paradigm (cat-out-of-the-bag) under which free will is crushed by the weight of the past, while at the same time warning that intentional manipulation of this psychological phenomenon would "distort the reasoning and holding" of the decision. *Elstad*, at U.S. 318.

Missouri v. Seibert presented the opportunity to address the manipulation of *Miranda* warnings. *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). In *Seibert* police officers intentionally conducted an unwarned custodial interrogation of the suspect until she confessed, then administered warnings, anticipating that she would continue making admissions, which she did. The plurality opinion in effect held that this two-step interview technique results in an involuntary confession when the warned portion is too closely associated with the prior unwarned part. Thus, the plurality opinion revived the cat-out-of-the-bag theory in cases where the psychological burden of an unwarned custodial confession is perceived to exert an insurmountable degree of control over a suspect's free will. The Court phrased this issue as "whether it would be reasonable to find that in these circumstances the warnings

could function 'effectively' as *Miranda* requires;" in other words, whether the warnings conveyed the idea that the suspect could make an "informed choice" about talking with police. *Seibert*, at S.Ct. 2610.

The opinion then set forth several factors that determine whether the psychological burden of admitting criminal behavior without *Miranda* admonitions carries over to the second, warned phase of the interview to such an extent that the lack of warnings creates what amounts to a presumption of involuntariness regarding the properly warned admissions. These indicia of involuntariness include 1) the detail of the questions and answers in the first round of interrogation, 2) the overlapping content of the two statements, 3) the timing and setting of the two phases of questioning, 4) continuity of police personnel, and 5) the degree to which the second round of questioning was treated as continuous with the first round. *See Seibert*, at 2612.

The Court induced these factors primarily by contrasting the facts with those presented in *Oregon v. Elstad*. Both *Seibert* and *Elstad* dealt with situations in which police obtained incriminating statements from custodial questioning of the suspects prior to administering *Miranda* warnings and then obtaining full confessions. In *Elstad* the Court found that the unwarned custodial admission made to police in the living room of the suspect's home bore no legally significant relationship to the subsequent station-house confession. In *Seibert*, however, this Court last year found that the vivid contrast with *Elstad* in the above-enumerated areas showed that Seibert's extensive unwarned custodial statement created doubt that subsequent *Miranda* warnings effectively notified her of a meaningful choice between remaining quiet or continuing to talk with police.

Petitioner William Ethridge Hill claims that this very phenomenon infected his interview with police, and then proceeds to apply the above five factors to what he describes

as the two "rounds" of questioning to which police subjected him. Hill argues that the first round consists of approximately four and one half hours of questioning, with the second round consisting of the written administration of *Miranda* warnings followed by about twenty minutes of clarifying the typed statement. Application of the above factors to these two "rounds" of questioning would indeed lead one to conclude that the written *Miranda* warnings were ineffective. The problem with Hill's use of these factors is that they are not relevant to resolution of the issue presented by this case. Because the complete *Miranda* admonishment was preceded by an explanation of Hill's right to silence, the complete admonishment was effective as a matter of law.

Hill's argument before this Court rests on his underlying assumption that a legally incomplete prior recitation of *Miranda* admonitions is equivalent to their complete omission. It is true that, had the trial court admitted into evidence Hill's oral custodial statements made after the incomplete recitation, admissibility would have been determined *as if* all admonitions had been omitted. This is because *Miranda* makes it clear that all admonitions are required to offset the potential coercive effects of custodial interrogation. But, when the issue is the effectiveness of properly administered subsequent admonitions, the function of prior admonitions changes in nature. The prior warnings need not be sufficient to defeat the legal fiction of presumed involuntariness in order to be significant. Rather, the prior warnings need only serve as a catalyst for both the suspect's appreciation of his current situation and the subsequent understanding of the later warnings. This concept of a suspect's actual appreciation of his rights, or more correctly, a reasonable person in the suspect's shoes appreciation of his rights, forms the foundation of *Missouri v. Seibert*, and distinguishes its holding from *Miranda*.

The *Miranda* Court specifically eschewed analysis of whether a suspect in fact knew his rights because it considered such analysis to be rife with speculation: "(W)e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda v. Arizona*, 384 U.S. 436 (1966), at 468. The danger was that a waiver of rights was "obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." *Miranda*, at 491. The Court has continued with this doctrine even though "(t)he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson v. United States*, 530 U.S. 428 (2000), at 444.

When the question becomes, however, the *effectiveness* of *Miranda* warnings, the suspect's appreciation of his rights is of paramount importance. This proposition is, *sub silencio*, the significant tenet of *Seibert*, for the crux of the plurality opinion is its derivation of factors that indicate how a "reasonable" suspect would have interpreted the experience of receiving warnings. The plurality opinion ends by noting that "the facts here do not reasonably support a conclusion that the warnings given could have served their purpose," a conclusion that immediately came on the heels of the following observation:

> It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk. *Seibert*, at S.Ct. 2613.

In the context of the present case, the critical issue becomes whether a "reasonable person" in Hill's shoes would have understood that he had a real choice regarding signing the typewritten confession. Addressing this issue correctly calls for the circumstances surrounding Hill's interview with police to be projected onto this reasonable person. In *Seibert* this Court used unique facts about the suspect and her interaction with police to show that the *Miranda* warnings were ineffective. Use of the reasonable person standard shows that the Court's goal was to determine, as nearly as possible, the conclusions reached by the suspect on the critical issues.[1]

The Court noted, for example, that she was awakened by police while staying with her son in the hospital and arrested at 3 a.m. before being taken to the police station where she was questioned without benefit of *Miranda* warnings. The Court then pointed to circumstances surrounding the suspect's interview with police, and to specific comments made during that interview, that buttressed its conclusion that

---

[1] The Third Circuit Court of Appeals has observed that a suspect's actual awareness of his legal rights is sometimes relevant:

> "We do not intimate that a defendant's subjective understanding of his or her rights controls the question of whether the warnings, as given, were misleading. Nonetheless, whether a defendant understood his rights is arguably relevant when a court is trying to determine whether plausibly equivalent warnings sufficiently convey notice of the fifth amendment rights protected in Miranda. The Court has made clear that the exact Miranda words are not necessary, but unless Miranda is overturned, something essentially equivalent to the familiar Miranda recitation must be conveyed to the suspect. In determining whether it is equivalent, we believe that a suspect's subjective opinion of what those words meant may sometimes be relevant."

United States v. Cruz, 910 F.2d 1072, fn 5 (3d Cir. 1990).

the suspect did not, in fact, have a "real choice" regarding the exercise of her rights once she was finally warned. *Seibert*, at 2610.

The State believes that the Court should likewise pay particular attention to the facts surrounding Hill's encounter with police, including comments made both before and after he received his written warnings. Not only are comments of the police relevant, but the State believes that all of Hill's statements are relevant to determining the effectiveness of the subsequent warnings.

The pivotal difference between *Seibert* and the present case is that Detective Gilchrest, when the interview became focused on Hill's whereabouts the night of the offense, advised Hill of his *rights* as interpreted in *Miranda*. As Gilchrest testified at pretrial, he forgot to carry *Miranda* "blue cards" with him, and he told Hill to listen, as he was going to "ramble" through the warnings. Hill now insinuates that this was part of some master plan of deception on Gilchrest's part, but the record, and common sense, do not support such a suggestion. As the following excerpt shows, Gilchrest twice told Hill of his right to remain silent, the second time specifically saying that "(y)ou don't have to talk to me now or at any time during the interview, okay?"

[44] MR. GILCREST (sic): Well, hey, you know, it's a tough job, but somebody has got to do it. Before we get into any specific questions, I need to make sure that you—you understand some things, okay? You know that you—like I said before, you don't have to be here talking to me.

THE WITNESS: Right.

MR. GILCREST: Okay. I'm going to tell you what your rights are.

THE WITNESS: Okay.

MR. GILCREST: You're not being arrested for this, okay?

THE WITNESS: Okay.

MR. GILCREST: But by the laws—I don't know how they are in here in Maryland, but by Texas law—and I'm sure it's the same all over—when I get into specifics with you, under these circumstances, I need to advise you of your rights, okay?

THE WITNESS: Right.

MR. GILCREST: If there's any of these things that you don't understand, tell me, and I'll try to explain them. They're pretty self-explanatory. Most of it you've heard on TV [45] shows.

THE WITNESS: And spent the most part of my life watching them. I didn't watch the news too much. I had recently had some really awful experiences with the APD. Like I said, my house gets robbed a year ago. I called in all the serial numbers. The police report comes back with no serial numbers.

MR. GILCREST: Okay.

THE WITNESS: I'm car-jacked in front of the police substation during that little (indistinguishable) (18:10:52) we had.

MR. GILCREST: Uh-huh. Uh-huh.

THE WITNESS: Get my face caved in. That guy breaks my windshield, which is why my old car is parked at Dan's.

MR. GILCREST: Right.

THE WITNESS: Well, actually, it was a wreck that caused that, but I had just gotten it fixed from the car-jacking. And I was about to re-license—it was my mother's car.

MR. GILCREST: Uh-huh.

THE WITNESS: I was going to re-license it in Texas. But I—you know, I had two guys that were basically copycats. I made a police report that [46] I—it happened at a police substation over by my house.

MR. GILCREST: Uh-huh.

THE WITNESS: And, you know, I swoll up like a whatever, and by the next Monday there was no record in the

computer. Dan went out of his way to try to—I ended up getting a new windshield for $150, which was a miracle. And then earlier this year I had a public intoxication charge, and they wouldn't—I couldn't even beg my way through a breathalizer. She said my eyes looked funny, and I was slurring my words, which I do because I'm missing two teeth, and I smelled of alcohol, which I had gone to the restaurant, fixed the sound system problem, laid in the floor, and it was in my clothing, but I begged for a test, and I showed the medical records. I had been bitten over the eye by a spider four days before, and I had been on antibiotics, and my eyes did look funny. In fact, when she looked a little closer, they looked horrible. But, you know, I never knew that you couldn't request—because I wasn't causing trouble.

MR. GILCREST: Uh-huh.

THE WITNESS: I was sitting—there [47] were actually—had someone else surrounded with four police cars. I was sitting there, and this rather large policewoman's rear was right in my face. And I finally said, Excuse me, ma'am, I just want you to know, the back of your—because I couldn't leave.

MR. GILCREST: Uh-huh.

THE WITNESS: And she turned around and shines the light in my eyes, and the next thing I know, I'm going downtown. And I get—you know, I got out at 7:00 the next morning. And even the nurse that examined me gave me my medication—

MR. GILCREST: Uh-huh.

THE WITNESS: —and everything, and I couldn't get any—so that and then the old check thing that you know about.

MR. GILCREST: Yeah.

THE WITNESS: And it's like between all those things and a car wreck, I eventually worked my way—paid things, worked everything out, and then left to see my mom, and I

was—I missed that flight by three minutes like I missed that first train by three minutes today.

MR. GILCREST: Okay. You're a three-minute kind of guy.

[48] THE WITNESS: I never have been before, but. . . And it took me two hours, like I said, to rebook it, so—

MR. GILCREST: All right.

THE WITNESS: —let's go ahead. So tell me what you need to know.

MR. GILCREST: Yeah. Just listen to this. Let me ramble through it if I could get my—my brain to work here. You have the right to have an attorney present prior to and during any question. You have the right to refuse to answer any question, okay? You have the right to consult an attorney anytime during the interview. You have the right to terminate the interview at any time, okay? Do you understand that all that so far?

THE WITNESS: Right.

MR. GILCREST: If you can't afford an attorney, you have the right to have one appointed to represent you prior to and during any questioning. Do you understand that?

THE WITNESS: Yes, sir.

MR. GILCREST: Okay. You have the right, as I said, to terminate this interview. You don't have to talk to me now or at any time during [49] the interview, okay?

THE WITNESS: Okay.

Transcript-44-49.

Even *Miranda*, while voicing the importance of each warning, made clear that the right to silence was the definitive Fifth Amendment right, which the other warnings served to support. The Court recognized that alternatives might exist, as long as they were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, at U.S. 467. In this Court's most recent significant *Miranda*

decision prior to *Seibert*, the Court reaffirmed that "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. U.S.*, at U.S. 442.

Detective Gilchrest did in fact advise Hill of all his Fifth Amendment *rights*. As the Court noted in *Dickerson*, the *Miranda* warnings "have come to be known colloquially as '*Miranda* rights.'" *Dickerson*, at U.S. 435. Indeed, the colloquial term seems more apt than the formal term, for there is only one actual warning among them. Even police officers, or *especially* police officers, would tend to gravitate toward the colloquial phraseology. Gilchrest's liability was that he spoke as a common man.

Gilchrest's strength lay in the fact that he was experienced enough, and conscientious enough, to interrupt his questioning of Hill so that he could administer *Miranda* warnings early on, before a question of custody arose. A person is in custody only if a reasonable person would think that his freedom of movement is restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318 (1994). Moreover, the subjective intent of a police officer is irrelevant unless that intent is in some way communicated to the suspect. *Id.* The fact that Gilchrest had an arrest warrant on Hill for credit card abuse but did not immediately inform him is irrelevant to the custody issue. Hill argues that this makes his case of trickery against Gilchrest. To the contrary, this is just good police work. If Gilchrest wanted to trick Hill, he would not have emphasized that Hill did not "have to talk to me now or at any time during the interview," at precisely the point when incriminating information might begin to come out. Transcript- 48.

Regardless of this everyday policeman's faults, the fact of the matter is that early on he, in unmistakable terms, focused Hill on the adversarial nature of the relationship between

himself and Hill. The State submits that Hill unquestionably knew his legal footing from this moment onward. Would he have thought that his statements were nothing more than insignificant chatter in the interview room? Hill was aware that he could get in trouble by what he said, as is the typical 5th grader sent to the principal's office. Indeed, the State submits that virtually any ordinary adult has the impression that admissions made to police after being advised of legal rights will be available as evidence against him in court.

The State understands and accepts *Miranda's* mandate for clarity in the custodial setting. The defect in Gilchrest's admonitions precluded admission into evidence of Hill's custodial oral statements made thereafter. The trial court so held. But the issue before this Court is the effectiveness of the subsequent written warnings, in light of Hill's earlier expressed understanding of his rights. "Where the initial violation of Miranda was not part of a deliberate strategy to undermine the warnings, Elstad appears to have survived Seibert." *United States v. Stewart*, 388 F.3d 1079, 1092 (7th Cir., 2004). It seems to the State that extension of the *Seibert* doctrine to the facts of this case would undermine the very principle upon which *Seibert* was based, namely, that a suspect's awareness that he has meaningful choices when talking with police is the heart of the Fifth Amendment.

B. A reasonable person in Hill's shoes would have understood that he had a meaningful choice regarding the exercise of his Fifth Amendment rights.

While determining a suspect's actual knowledge of his rights might be too burdensome in the first instance, when the question is the effectiveness of a subsequent complete set of admonitions, the suspect's actual knowledge is important, for this is part of what comprises the "reasonable person" in the suspect's shoes. This must be ascertained from the circum-

stances surrounding the reception of warnings, and from the reasonable perceptions of the recipient.

This subjectivity makes sense in Hill's case, where questioning occurred before full admonishment. When evaluating the admissibility of statements made after an incomplete admonishment, precedent requires that we ignore the degree of understanding a suspect has of his rights. It is necessary, indeed proper, that we indulge legal fictions in order to ensure that fundamental rights are not compromised. This does not mean, however, that we are thereby rendered forever blind. When the question becomes whether a subsequent warning conveyed its meaning, then the likely effect of an earlier partial warning is significant, and this need not be determined in a vacuum. The surrounding circumstances give life to what would otherwise be abstractions.

Things said indicate the conclusions that are being drawn, and the Court in *Seibert* relied on conclusions assumed to have been drawn by the suspect, particularly regarding her right to remain silent. The Court concluded that Seibert would not have realized that she had a real choice whether to admit her role in the crime. This likely conclusion was necessarily dependent upon her knowledge and experience in relation to the circumstances surrounding her custodial interview. The only way to conceptualize the possible conclusions drawn by a suspect is to deduce them through use of the imagined reasonable person who stood in her shoes.

In the present case, since Hill was unquestionably apprised of his Fifth Amendment right to silence early on during the interview, his complaint must necessarily be confined to his suggestion that he had no awareness of the potential consequences of talking to police. Perhaps the soundest rebuttal to this suggestion is the fact that, for the first two-thirds of the interview, Hill doggedly maintained that he did not visit the deceased the night of the crime, even while Gilchrest was telling him that a neighbor saw him park his car and approach

the deceased's home at 3 a.m. It strains reason to think that Hill was holding back on the truth simply to play hide and seek. Hill stuck to his story until he became convinced that the detectives were not falling for it, and that time was running out. Hill finally gave in, admitting that he went to visit the deceased the night of his death: "Okay. You get it. I did go over there, okay?" Trans.- 168.[2] Coming from

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[2] This admission was made less than five minutes after Gilchrest, in exasperation, told Hill he was being placed under arrest on the credit card abuse warrant, and was going to jail. Then Roach surmised that Hill and the victim fought after the victim found Hill going through his wallet, which Hill vehemently denied. Gilchrest finally implored Hill to just admit he really did go to the deceased's house, without saying what happened inside. Trans. 164.

The officers knew Hill wanted to see his mother, and told Hill that his mother would want him to tell the truth. It is true that the officers played on Hill's wish to spend time with his mother. A wish on Hill's part, however, does not amount to a promise on Gilchrest's part. Gilchrest's statement was too ambiguous to qualify as an unlawful inducement. "The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible . . . the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here." *United States v. Rutledge*, 900 F.2d 1127 (7th Cir., 1990). Also, see *United States v. Ferrara*, 377 F.2d 16 (2d Cir., 1967) (holding federal agent's statement that cooperation would enable suspect to get out on reduced bond did not render confession involuntary); *State v. Churchill*, 231 Kan. 408, (Kan., 1982) (discussing rule that a confession induced by the promise of a collateral benefit, i.e., no benefit to the suspect with respect to the crime under inquiry, is generally considered voluntary). According to *Oregon v. Elstad*, a subsequent properly warned statement is admissible as long as the prior statement was voluntary, i.e., it did not result from "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Id.*, at 309. Hill's earlier statements were voluntary.

Hill in effect conceded this point when he did not argue in his petition for review to the Texas Court of Criminal Appeals that prior admissions

someone who had experience dealing with police, this shows that Hill knew the game was over.

The State believes these circumstances from the first portion of the interview are relevant because of the nature of the inquiry, namely, the effectiveness of the later warnings. The most important circumstances relevant to this inquiry, however, are the circumstances surrounding those later warnings. The attached appendix contains Hill's interview from the point at which Gilchrest retrieved his laptop so that he could prepare the written statement. See Transcript- 205-246.

The first ten to fifteen minutes were spent discussing the chances of Hill making bond the following day. Then about thirty minutes were spent going over what Hill had to say about the night of the crime, before Gilchrest left to print the statement. When he returned, Gilchrest gave the printed copy to Hill and told him to read it "from the very top." Thereafter Hill began talking about his use of the victim's nickname during the first part of the statement, but Gilchrest interrupted and asked Hill specifically if he had read all the warnings. Trans.- 234. Hill replied that he had, and then agreed that they were "(t)he same thing I told you before."

Hill now argues that this interchange is further proof of Gilchrest's trickery. His argument seems to be that having Hill read the warnings for himself was a ploy to get Hill to skip over the warning of adversarial consequences. This

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were involuntary because of an unlawful inducement. He has therefore procedurally defaulted further complaint on that issue.

The attached appendix contains the conversation between Hill and the officers after Hill's oral confession. Hill asked several questions related to his chances of making bond so that he could visit his mother before returning to Texas. Gilchrest told him that was unlikely. Trans.- 212. The transcript supports the State's position that the officers did not make even an implied promise to Hill.

argument is far too speculative, and is an unfair portrayal of Gilchrest. Gilchrest not only permitted, he encouraged Hill to call his mother before getting down to the business of preparing the written statement. Trans. -209. The effect of this action should come within Justice Kennedy's notion of "curative steps," even though this is not a case of intentional omission. *Seibert*, at 2616.

There is no reason to believe that Gilchrest's directive to read and understand the warnings is anything other than an attempt to focus importance on them. Gilchrest was attempting to ensure that Hill fully understood the warnings. The State submits that the most cogent interpretation of this interchange is that Hill was agreeing that he fully understood any statements made could be used against him in court, and was aware that he had a meaningful choice whether to continue.

A written waiver of rights accompanying a signed, written, confession adds a dimension to the analysis not present in *Seibert*. The formality of a written statement severs it from the prior interview, diminishing the significance of *Seibert's* observation that the suspect would view the interview as continuous. Hill obviously attached great significance to the written statement, as shown by his almost obsessive attention to detail.

The transcript speaks for itself. We do not know whether Hill's acknowledgment of adversarial consequences means that he had, all along, assumed this notion applied to the entire interview (because he 'heard it' as Gilchrest was reciting his rights), or whether he was simply acknowledging his understanding that it applied to the written statement. Because the importance of the written statement to police was obvious, either of these reasonable interpretations of Hill's "Uh-huh" supports the State's conclusion that the written admonishment was effective in conveying a real choice. On the other hand, Hill's implied argument that this response is a signal that he signed the statement out of confusion over the

exercise of his Fifth Amendment rights seems to push the limits of reason.

Based upon common sense, knowledge, experience, and Gilchrest's prior admonishment, the State submits that Hill was fully cognizant of the importance of the written statement. As Hill examined the written statement he began explaining several points in slightly different terms, but was uncertain how to phrase them. The following responses by Gilchrest stand out:[3]

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[3] p. 233

Gilcrest: Okay. Let me go print this up, let you read it, make sure that's what you want to say. We're pretty close to being done. I'll be right back.

(Brief Recess)

Gilcrest: I want you to read this . . . If there's anything in here that is not true or not correct or I put it down wrong, tell me and we'll change it, okay? Read it from the very top, okay?

Hill: Do you see one thing? I called him Bill more often than I called him Cato. That was an occasional . . .

p. 234

Gilcrest: Okay. Well—

Hill: When I was around people that called him Cato, I called him Cato. When I was around people that called him Bill, I called him Bill.

Gilcrest: And I changed it about halfway through and started calling him Bill also, as you did.

Did you start from the top?

Hill: Uh-huh.

Gilcrest: Okay. You read all these warnings?

Hill: Uh-huh.

Gilcrest: The same thing I told you before?

Hill: Uh-huh.

Gilcrest: All right. Don't (inaudible) me off for spelling or anything.

Is there something there you don't understand?

Hill: No.

p. 236

Hill: You know, I don't know if that should be on there or not.

Gilcrest: It's your statement. You tell me what you want on there.

Hill: Okay. I wanted to add Bill was acting – and that I didn't go over there intending to harm Bill. And, actually, it was a protective reflex. I don't know how to say that without sounding stupid.

Gilcrest: That's the way I'll put it if that's what you want to do.

p. 237

Gilcrest: So you want to add at the bottom it was—

Hill: It was—it was a—

Gilcrest: It was a self-protective reflex?

Hill: Yes. It was a – I don't know. If somebody comes at you, what do you do?

Gilcrest: Probably the same thing.

Hill: I don't know—I don't think that's necessary, but…

Gilcrest: I'll just add, "I took the keys when I left. I drove Bill's truck down the street and parked it, as I've done before."

Hill: Yeah, because if you – you know, if –

Gilcrest: Is that what you want to say?

p. 238

Hill: Not really. I don't know.

Gilcrest: Is this okay this way, or do you want to add something?

Gilcrest: Okay. Let me go – let me go add this part here and get this "the" out—

Hill: Okay.

Gilcrest: —on this page.

—It's your statement. You tell me what you want on there. Trans. 236.

—That's the way I'll put it if that's what you want to do. Trans. 236

—So you want to add at the bottom it was -- Trans. 237

—Is that what you want to say? Trans. 237

Before leaving to print another copy with the changes, Gilchrest told Hill:

"While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or anything else. They're just going to witness you sign this statement, okay? You can do

---

While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or anything else. They're just going to witness you sign this statement, okay? You can do that on these two pages, and I'll go change this, okay?

Hill: All right.

Roach: Jane, Allen, why don't you come on in. You just have to witness him sign this.

(Female speaker):Okay.

p. 242

Gilcrest: Just put the date and time below the signatures.

Hill: Yeah. He—I don't know if that should be—do you think I should change that, because he was?

Gilcrest: Don't ask me what I think. It's your statement, okay? If you want me to scratch it out, we'll just put a line through it, and let you initial it and just scratch out that word.

Hill: Yeah.

p. 243

Gilcrest: What I want you to do is while these folks are watching, I want you to initial out beside this line for this scratch out.

Hill: Okay.

that on these two pages, and I'll go change this, okay?" Trans. 238.

Hill knew that this was his official version of what happened, and he worked to make it as correct as possible. Without question Hill knew that he was about to sign his name to a formal legal document that could be used as evidence against him. He also knew that the rules surrounding this document were strict, and that the police were very focused on it. There is no reason to think that Hill had forgotten Gilchrest's earlier advice that he had a continuing right to silence or to terminate the interview. From these circumstances it seems safe to conclude that Hill was aware he could choose to sign the document, or refuse to sign it, and he would have logically concluded that refusing to sign the statement would deprive the police of something that they wanted, i.e., evidence. Hill did not know the interview was being recorded, so, in light of the focus on the written statement, would not have been likely to believe, at this point, that his earlier oral statements were of interest to police.

Hill's argument must necessarily rest on the following propositions:

1) The oral admonishment deceived him into believing that what he said could not be used against him (in spite of the detailed recitation of rights),

2) Then the written admonishment told him that what he had said could in fact be used against him (except not in the written statement unless he signed it),

3) Since he now felt trapped because he had earlier spilled the beans he agreed to sign it, even though he was fully aware that (a) he did not have to sign the written statement, (b) it required multiple witnesses and special rules, and (c) the police were now very interested in him signing it,

4) And, finally, Gilchrest planned the whole scheme to work out this way.

While almost anything may be theoretically possible, the State respectfully submits that application of these propositions to the facts of the present case creates an extremely unlikely scenario. In the language of *Seibert,* a reasonable person in Hill's shoes would have realized he had a meaningful choice. Extension of *Seibert* to this set of facts would have the effect of fully rejuvenating the discredited cat-out-of-the-bag theory. While few conclusions are crystal clear when employing the reasonable person standard, the State nevertheless submits that the foregoing conclusion is firmly grounded.

CONCLUSION

Elstad v. Oregon held that a confession obtained after proper *Miranda* admonishments is admissible, even if custodial interrogation occurred prior to admonishment, as long as the initial questioning was otherwise voluntary. The only exception on which a majority of the Justices agree is when investigators employ a two-step interview technique where *Miranda* warnings are deliberately withheld to facilitate obtaining unwarned incriminating information prior to formal admonishment.

The rationale of *Seibert v. Missouri,* as a matter of law, does not apply to the present case. Detective Gilchrest, from memory, advised Hill of his Fifth Amendment *rights*, including the continuing right of silence, at a point in the interview before incriminating evidence was likely to surface. He left out the warning that any statement may have adversarial consequences, but quite firmly focused Hill on his right to silence, in a manner likely to impress upon any typical adult the inevitable conclusion that any statements made could be used as evidence against him.

Seibert stands for the proposition that, when warnings are not administered at the beginning of custodial interrogation, courts will look at the surrounding circumstances to determine whether the warnings were effective in communicating to a reasonable person in the suspect's shoes that he had a real choice whether to exercise his Fifth Amendment right to silence. The surrounding circumstances include a suspect's knowledge and experience, along with conclusions drawn from comments made by both the suspect and investigators during the course of the entire interview.

Hill's argument must necessarily be confined to the proposition that the inadvertent omission of the warning of adversarial consequences during a prior admonishment, before incriminating evidence surfaced, so contaminated the interview process that the subsequent complete administration of written admonishments could not effectively convey to him that he had a real choice whether to exercise his right not to incriminate himself. The fact that Hill was actively engaged in the process of revising his written statement, indicating a desire on his part to make his version of events known, combined with the formality of signing the statement, i.e., that it be witnessed by two non-police personnel and that strict Texas rules governed its legitimacy, all lead to the conclusion that Hill consciously and freely gave up his right to remain silent.

Therefore, this Court need not wonder whether further *Seibert* proceedings in the Texas appellate courts would be of any benefit. There are no issues needing resolution prior to this Court's determination that the present case is governed by *Oregon v. Elstad*. The petition for writ of certiorari should be denied.

PRAYER

WHEREFORE, premises considered, the State of Texas prays that this Court deny Hill's petition for writ of certiorari to the Texas Court of Appeals, Third Judicial District.

Respectfully submitted,

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APPENDIX

APPENDIX A

Transcript of Videotaped Statement of William E. Hill,
pages 205 through 247

[205] MR. GILCREST: Okay. Let's take a little break here, and I'm going to go get my laptop, and we're going to go back over just the part of what happened when you went over there.

THE WITNESS: Okay.

MR. GILCREST: Why you went over there and what happened when you went over there. And let me type it up and get it on paper, and then we're going to quit for the night.

THE WITNESS: Well, am I going to have to stay in jail, or can I go to my mother's?

MR. GILCREST: Well, let me—let's finish up here, and we'll discuss that, okay?

THE WITNESS: I'm not running from [206] here.

MR. GILCREST: No. Let me—this is not my state. I have no control here, you know. I don't know what their laws are. I don't know what—you know, the federal people are involved. I don't know what their role in this is. But probably what's going to happen, we're going to have to deal with the laws of the state of Maryland. That's usually the way it goes. But that's something we're going to—we're going to figure out before we leave. Let's get this part taken care of. Oh, man. I have to tell you. You—you wore me out.

THE WITNESS: Man, I'm sorry.

MR. ROACH: What do you think? You feel better? You feel better?

THE WITNESS: Yeah.

MR. ROACH: I told you you would. We're going to put this on paper and get him to bed.

THE WITNESS: Is there any possibility I could spend the night with my mother?

MR. ROACH: The papers are—the papers are down there in Texas. We can't do that. You can call her and talk to her, and maybe we'll get you out tomorrow. No, you've got to be booked and processed and go in there. Just tell her—

[207] MR. GILCREST: On the—

THE WITNESS: What? What?

MR. GILCREST: On the credit card use. I don't know what the deal is with the extradition and all that stuff, but it's—it's kind of a complicated deal, but let's get this on paper, and then we'll find out all the rules and regulations and let you know and let you call your mom, okay?

THE WITNESS: Okay.

MR. ROACH: What were you going to—what did you stand to gain by sitting here lying all night? You know, he's got the case made, and now we're just trying to get you to help yourself. That's a hell of a lot better story than what the jury can figure out on their own.

MR. GILCREST: It's a hard thing, Mr. Roach. It's a hard thing.

MR. ROACH: It is difficult. Well where are you going now?

THE WITNESS: I . . . don't know. I was following you guys. I was following you guys.

MR. GILCREST: Yeah, I'm going to bring my laptop in here, and we're going to—we're going to do the—

MR. ROACH: Are we going to do the [208] indictment or anything?

MR. GILCREST: Yeah. We're just going to try to get it down.

MR. ROACH: We should let him call his mother too, because she'll be in bed.

MR. GILCREST: That's fine. Give her a call and tell her—

THE WITNESS: Okay. Let me ask you this, then. Where do we stand? I need to be able to spend, if possible, some time with her. So are you talking about if I have to spend the night here, if there's a bailing bond, or this, that, and the other?

MR. ROACH: There's always a bond involved.

THE WITNESS: Will I be able to, while I'm still here, without going back to Texas—

MR. ROACH: You're not going back to Texas tonight or tomorrow or the next day. You're going to the County Detention Center a short distance from your mother's house. They'll have a bond hearing probably in the morning. She'll be able to go over there and visit you. Your sister will be able to visit you. It's close proximity to her home. And after the bond hearing, they'll know a lot [209] more.

THE WITNESS: What is the possibility of my being able to go spend time with her?

MR. ROACH: She'll be able to spend time with you at the detention center. If you make bond, you can go right home.

THE WITNESS: Okay.

MR. ROACH: Okay.

THE WITNESS: I was just asking what are the odds of me making bond?

MR. ROACH: Probably pretty good.

MR. GILCREST: Yeah, I don't see a problem with that.

MR. ROACH: Because of your cooperation and everything, I mean, I don't see a problem. It all depends. We can't speak for that, but, you know, probably pretty good.

THE WITNESS: Because I really need to get over there and spend a little time with her.

MR. GILCREST: Why don't you go ahead and give her a call.

THE WITNESS: Okay.

MR. GILCREST: Where can he use the phone?

(Brief Recess)

[210] (Beginning of Part II)

THE WITNESS: (21:39:07) Well, I know that—

MR. GILCREST: That's hard on her, I know.

THE WITNESS: Well, it's just that I told her, you know, the schedule that we just talked about.

MR. GILCREST: Okay.

THE WITNESS: And, you know, it's—I know that this is really—I know how serious this is, but it's really, really important that—that I get to spend some time with her, and I know you have no power over that or anything like that, but would you honestly tell me, you know, am I being assigned over here without being potentially able to make bond on the other and spend a couple of days with my mom?

MR. GILCREST: Ethridge, I don't want to lie to you, and if I told you I knew the answer to that, I would be lying. I don't know Maryland rules. I don't know McCormick County rules.

THE WITNESS: I mean, he just told me he was reasonably certain there was a bond hearing tomorrow morning, and I would be able—

MR. GILCREST: That bond hearing, [211] that's pretty universal. I mean, you can't be held in jail without having a hearing of some sort if there's a bond set. What it's going to take to get you bonded out, I don't know. I mean, I don't know if you have to come up with the whole amount or part of the amount.

THE WITNESS: Well, we're talking at this point the bond being for the credit card thing?

MR. GILCREST: Right.

THE WITNESS: Where do—

MR. GILCREST: In all honesty—

THE WITNESS: Where do these two overlap?

MR. GILCREST: Well, obviously, what we did here tonight is—I'm going to be on the phone when we finish up and—and talking to my boss and my district attorney and then, you know, we'll know from there. There is a reasonable amount of certainty that there's going to be a charge filed on you anywhere from manslaughter to—to murder, okay? When that gets done is still up in the air. In all probability, though, I mean, it needs to get done before you get out of jail, because although you [212] give me your word that you're not going to run off to Canada or someplace, the district attorney is not going to accept that. So, you know, that's—in all honesty, that's what we're dealing with, and you may have an additional bond to come up with before the bond hearing. You understand what I'm saying?

THE WITNESS: Uh-huh.

MR. GILCREST: Okay. The extradition part of it is a whole nother story, and you'll have to talk to the people in

the jail about that. They'll—they'll know all the rules and regulations. And, you know, the best bet for you to visit with your mom is for her to get over to the jail and you-all visit. It's going to be really tough for you to get back home for a while.

THE WITNESS: Uh-huh.

MR. GILCREST: Okay. And, you know, I'm sorry I can't give you a definite answer on every—

THE WITNESS: I'm basically saying at this point, before I'm sent—

MR. ROACH: You'll make bond on this charge tonight. If they get the other charge up there in time, that will be another bond hearing, and that will either be increased significantly more or [213] be denied, or the judge could release you to the custody of your mother. If she signed over the deed to the house or whatever, and your sister or whatever—you've got a responsible family. You've got roots in the community. I don't think you're a flight risk. I think you'll make bond on the one charge, credit card abuse. Everybody gets out on that. I mean, they don't hold people in jail for that. And—and this other charge, it all depends what the D.A. makes of it, now, and what they charge, so—how much bond is going to be or whatever. You might get released on your own cognizance, released to your mother's custody, you know.

THE WITNESS: Like I say, I have a sister and a brother-in-law here that are both lawyers in Washington, DC, as well—and a prominent family. And that's another reason that—that's you know, I'm the only one that's not—I have—

MR. ROACH: From 24 hours from now, you'll have all the answers, and all the questions will be answered, and your family will know more than we do, because they'll be acting with the attorney and whatever. And it's just a slow process,

and we can't speed it up now. I mean, you've been waiting for this thing to end for quite a while.

[214] THE WITNESS: So you think—so you think there will be a bond hearing tomorrow, though?

MR. ROACH: Yes, there will be for the charge you're being incarcerated on tonight.

THE WITNESS: Right.

MR. ROACH: And you might make it. You might make it before the other law gets here, before they file the detainer, before the authorities in Austin file the detainer, you might make it. And then they'll come out and get you again, and you'll go before the commissioner again and lodge you again on the new one, and you don't want that to happen. You want to do both of them while you're in there. So—

THE WITNESS: Yeah.

MR. ROACH: —just wait it out.

THE WITNESS: Well, my mother doesn't own her house, so she won't be able to mortgage it, because she's leasing it. But I wouldn't want her to do that anyway.

MR. ROACH: There's other people in your family, responsible people with some assets. They can put up a personal recognizance bond or property bond or whatever.

THE WITNESS: Yeah.

[215] MR. ROACH: Surely.

THE WITNESS: I do.

MR. ROACH: Surely. Which means that it doesn't cost them anything, if you keep showing up for all your appearances and going to Texas when they want you to and this, that, and the other. But this has to be resolved, and hiding from it and lying from it and waiting for—waiting for Detective Gilcrest to call you and going to New York, that ain't no

way to live. You didn't want to live like that. You wanted to get it resolved.

MR. GILCREST: Which we did. And it's going to be much better for you.

Q. (By Mr. Gilcrest) What's your birth date?
A. September the 14th, 1949.
Q. 1948?
A. Uh-huh.
Q. Okay. (21:45:32).

THE WITNESS: Thanks, both of you.

MR. ROACH: You're welcome, Ethridge. You struggled with it. You struggled with it. And we thought if we stuck with you long enough, that your own decency would win out.

MR. GILCREST: And it did.

THE WITNESS: It's just that—[216] (inaudible) way I had established is that—you're right. It's probably from blocking it out and—and just (inaudible) about the disappointment and heartache you're going to cause your family and—but . . .

MR. ROACH: Well, pick up the phone and call the EMS and dial 911 right then and there, you wouldn't have a problem.

THE WITNESS: Yeah, I wanted to too.

MR. ROACH: Two—two drunks get to pushing and shoving, and one falls down and hits his head, the one that didn't fall down picks up the phone and calls EMS—

THE WITNESS: I wanted to.

MR. ROACH: —or 911.

THE WITNESS: I said, Bill—

MR. ROACH: You standing there saying that he came at me, I held up my hands and he tripped and fell and hit his head, I'm upset. I called the doctor—

THE WITNESS: —(inaudible) me holding up my hands. I had beer in it, and I turned my shoulder and I—but he got back up.

MR. ROACH: Well, if you had told that story then, if you had told it then, if you had done [217] the right thing—what you did was, you did what everybody does, you got scared—

THE WITNESS: Yeah.

MR. ROACH: —and ran away.

THE WITNESS: I was actually—

MR. ROACH: That just doesn't resolve anything.

THE WITNESS: I actually was more than just scared. I actually got bordered away. I—

MR. GILCREST: (21:47:21) You know, if he was a sober, responsible person, it wouldn't have even happened, but he was not.

THE WITNESS: Well, you're right there. But I—I yelled at him, Bill, we need to call EMS. And he—I got—I know you're right. I'm not—

MR. ROACH: I know I'm right.

Q. (By Mr. Gilcrest) Is Kensington spelled with one "n" or two?

A. K-e-n-s-i-n-g—

MR. ROACH: t-o-n.

THE WITNESS: I had—I didn't—well, like I say, I've been through similar things with him before, but, again, where—I don't know. I had called the house after I got here, when I got the busy signal, to check on him, [218] and—you

know, because it's like when he'd want somebody—well, when he was like that, he gets drunk. Yeah, you're right. It's like I got scared, and I did—basically at that point I just (inaudible). I'm getting like bits and pieces wanting to—a few things coming back to me. You're right. I—I blocked it.

MR. GILCREST: And there's probably more detail that are going to pop into your brain (inaudible).

MR. ROACH: Yeah, you crossed a big hurdle here when you started telling the truth, and you would be well advised to continue telling the truth when you start talking to your attorney; not to change anything, to make things go better. If anything—if anything, you want to tell him even a more complete version than you did us. You see what happens when people don't tell their attorneys the truth? You see what happened to Norte (phonetic) Albert?

THE WITNESS: Yeah, I see. Well—I don't know.

MR. ROACH: Norte (phonetic) Albert [219] didn't get over the hurdle.that you just did. He couldn't tell the truth to himself or to his attorney. And, therefore, when the witnesses took the stand, he looked at his attorney and said, I know this woman is not going to matter. He was still denying. Still denying. And so cowboy cop were just sitting in there, and they don't know (21:50:30).

THE WITNESS: You know, I—I didn't know until Doug called on that obituary that he was dead. I really . . .

Q. (By Mr. Gilcrest) You said you lived with Cato for about a year?

A. Close to it, I guess. It seemed like something like that.

Q. So you actually moved out the Friday—

A. Yeah.

Q. —the Friday before that?

A. I had every intention of being gone. I didn't have any—you know, I was ready to move on in life. I didn't need for Bill to go anywhere.

Q. Did Bill ask you to move, honestly?

A. Yes, and I was—

Q. You were ready to go?

A. It was funny, because I was going to tell him that I—tell him that I should even be out by [220] my birthday, and we talked—we brought the subject up at almost the exact same second, and we laughed about it. It was like, I said—you know, he said, Now that I'm home so much, I just—you know, this house just really isn't big enough for two people. And it's really not. Because he wouldn't—because he likes to pass out in the living room. You can't—you can't come in late at night yourself and have any sort of like—you can't come in and watch a movie, or whatever. You have to go back and hibernate, whatever, because he literally takes up space. And we laughed about that, and he said, Yeah. I said, Well—you know, I told him what my plans were at that point, which were to—I was already beginning to think about the island. And if not the island, come over ere to the east, (inaudible) New York, stay with my sister, and one would have been move here, because all my family is moving to this part of the world, so—and we—our relationship really improved just after we made a decision.

Q. When you talk about the island, you're talking about Padre Island, then?

A. Uh-huh. South Padre as opposed to [221] Corpus Christi.

Q. Your original flight was scheduled for that Tuesday?

A. Uh-huh. Well, actually, the first flight, it was Monday, and I didn't get to go back to the island. My original—the one I missed, though, was scheduled for—

Q. Tuesday?

A. —was scheduled for Tuesday, and I missed it that afternoon like literally by three minutes and—I had already tipped the guy that had rushed my bags onto the plane, and it took forever to get it rescheduled for that next morning.

Q. And you went back to Victoria's and—

A. Yeah, to a less than friendly environment.

Q. —and stayed there for that night.

A. Because after fixing her stereo, I fell asleep pretty quickly. (Inaudible). But, like I say, (inaudible) my high blood pressure is—keeps you asleep sometimes.

Q. What time did you say you went to bed?

A. Loosely between 10 and 10:30. Probably closer to 10:30.

Q. You said you saw that it was—after you were awakened by Victoria, you had went to get a [222] drink, and you saw that it was still early enough to go talk to Bill?

A. Yeah. It was after—it was right at bar closing, right after bar closing, so I went in and washed my face and, you know, put my clothes on and—I had called him earlier, and he was never around, and so . . . I had—

Q. (22:00:41) You knew that he was going to—that he was probably going to be coming home about that time from the bar as was his usual time?

A. Yes. Yes, his usual—here's—here's the funny thing about it. I bought that six-pack of beer that afternoon when I went by to leave the keys. It was still in the car. I was just taking it to him. And then . . . (22:01:10) Because—stick through the hell (inaudible). And, once again, I think I told you this real early on, but Bill was not always—well, you know, he was not always like this. Sometimes—he wasn't surly always. And the night before, like I said, he was real congenial, and we still had a couple of things to talk about. (Inaudible). I said—I said, you know, if I have time, I'll check in with you tomorrow, and I didn't have time with the [223] flight. I missed that; came back. And I had called him at the house again I guess before I went to Victoria's, too, and he was out and about, so that was pretty right on line. And we sat up a lot of nights, you know, till 2 or 3:00 in the morning, drank and shot the shit, and actually got along fine. Sometimes that was the best time to talk to him.

Q. Uh-huh. You said the door was open. Was it open enough for you to see into the room?

A. Not until I—as I knocked on it.

Q. Okay.

A. And that's why I said I didn't really—I kind of like (indicating), and I—"Bill"? "Come on in." And as far as neighbors not hearing the knock, did the neighbors also tell you the television was on about 36 and loud enough to be heard all over the street?

Q. They said that that was so usual that they almost didn't even notice.

A. You could not knock loud enough to be heard over that. That's why—it was. And so often it was because of the stuff that I built. Actually, if he couldn't blow it up . . .

Q. Yeah, they all said that it was a usual [224] thing for the music or the TV or whatever to be blaring.

A. He could actually fall asleep there holding the remote control, clenching it in his hand. And you could go by and manually shut the stuff off and it wouldn't wake him up.

Q. Uh-huh. Did you actually hear him say come in—

A. Yeah.

Q. —or did you understand him?

A. Yeah, I actually did, because I'm used to—I'm used to it. You know, he kind of (indicating). You know, and then it's like he really snapped out of it. And I don't know what he saw, because he wasn't really looking at—have you ever seen somebody awakened and they had just this look in their eyes like—if you're having a really bad nightmare, and you wake up and you're just in stark terror and you don't know why—

Q. Uh-huh.

A. —and he just looked like a—like a—it's that deer in the headlights thing. And I've seen him sit on the couch, jump up, lay back down. I've seen all matter of strange things. I just treated them with whatever—[225] it's somewhere deep down inside of Bill that—man. Not really more

than your average—how do you put it without—that's one reason I told you—I told you the first time, I said, you know, he didn't necessarily have to be drunk to be that unconscious or—he just—I don't even know why I was trying—what I'm trying to make a point, but he—he was very volatile.

Q. Uh-huh.

A. And other times he was a total sweetheart.

Q. (22:07:12) The lamp hit you in the left shoulder you said?

A. Uh-huh. I was approaching from the door. I mean, he—when he jumped up, he—he was actually literally—it was more than just like coming at me. It was staggering back and forth, and I—I'm going to tell you now, we both—I broke—the time that I had the P.I. deal when I was arrested when I hadn't had a single drink, I came home that morning at 7 a.m. and hit that same thing on the couch and broke two toes—

Q. Uh-huh.

A. —by not seeing it.

Q. Uh-huh.

A. And so—and hit my head at the same time. [226] This is not a vindication of anything.

Q. Right.

A. I'm just saying that this is—I'm looking back at that furniture. I don't know what's left of it. But if there's anything left of it, you would find a print of one leg in the middle that sticks out about three inches over the others. And I know that when I jumped back, I know I hit the edge of that table, and—I mean, it moves. The carpet slides. It's very heavy, heavyweight and . . . (Inaudible) changes, the fact I should have gone ahead and called EMS. No matter what he was saying, no matter what he was doing, he's right. We actually virtually argued over whether to call EMS. We actually virtually argued over whether to call EMS.

Q. (22:12:03) So after—okay. When the—when the lamp hit you and the bowl broke, you gave Bill a—kind of lowered

your shoulder and gave Bill a body block and knocked him down onto the coffee table?

A. He kind of had—he kind of had momentum of his own already, but I—yes.

Q. Okay. And—

A. He kind of fell—kind of like—

[227] Q. He hit the table and then he fell to the floor?

A. And under it as well.

Q. Okay.

A. And it was like he was stuck.

Q. Uh-huh.

A. And—and he just kind of went nuts for a minute or two.

Q. Okay.

A. And then he got back up, and I actually—I actually tried to approach him, Hey, man, you know. And I don't even know what I said. It was basically just, you know, get a grip. It's like he wasn't—it wasn't—it was like he wasn't—it was like it wasn't me he was looking at.

Q. Go ahead. What were you going to say?

A. I went to leave, and I got about barely around the corner, and I realized that I—I didn't know what condition I left his truck in, and I went back and locked it.

Q. You locked—

A. —the door. I actually came back and locked the truck door.

Q. The truck door wasn't locked, when we found it.

[228] A. It wasn't? I tried.

Q. (22:15:49) Did you take anything out of his truck?

A. No. He normally had his computer and stuff like that, business papers. That's why I came back, because—because I . . .

Q. So when you was walking out the—the last time you saw Bill, he was kind of halfway standing and halfway kneeling on the floor?

A. It was more standing. He was on his feet. He wasn't kneeling at that point. He was up—I mean, he was up enough to be belligerently telling me he would take care of it. And I said, Bill, man, we need to call EMS; we need to call EMS. And he—he just told me to get out. He said, I'll take care of it. That's kind of—I got the get out part, but the I'll take care of it, whenever he got mad, talking about anything, he would, you know—if you offered to help him with anything, it was like I'll take care of it. But it wasn't—it was definitely—it was screamed. It was—and at the same time the damn TV was louder than hell and . . .

Q. At what point did you get his car keys?

A. On the way out.

Q. Where were they?

[229] A. They were laying on the floor by the door. Just like he came in and tossed them down.

Q. You just happened to see them there?

A. Yeah. I was just basically being—sort of hurrying towards the door, and he's saying he'll take care of it, and I'm going, but he—he's not—he—he's a mess.

Q. Uh-huh.

A. And there—there's a—there's a little entryway where—you know, where there's not—there's no carpet—

Q. Uh-huh.

A. —and things like that stand out like a sore thumb. It wasn't unusual for Bill to leave a trail of watches. He would take off his watch, a sock, a shoe, drop his—he lost his keys about every third day.

Q. Did you go straight back to Victoria's?

A. Yes, I did.

Q. (22:21:22) There's not any more of his checks outstanding?

A. None.

Q. Okay.

A. We had—we had—those—that was quite a while back. We had an ASAP agreement on it, and we [230] were vir-

tually paid off, and we had some other business going on between us.

Q. Uh-huh.

A. Like I said, we were really at least pretty amicable the last few weeks, and just the fact that, you know—and see, I spent two days before I left cleaning up that carport and getting all the paint off the floor and . . .

Q. Had you moved all your stuff out by then?

A. No.

Q. I mean, from the carport?

A. No. I had—

Q. All the paint thinners and stuff like that?

A. They were all in the garbage, and they were—they were taken out on Monday in our garbage thing. But Bill had a ton of shit of his own. Like I said, he was a big—he was a tool man. He had a big long (inaudible) thing. He kept varieties of cleaning agents and stuff like that and, you know, a lot of things I didn't know about that were automotive stuff. I'm not an auto mechanic. Stuff. And, plus, it was an old house. It's like the week before the hot water heater sprung a—a gas leak, and both of us woke up with headaches from it.

[231] Q. Uh-huh. Okay. And you told me the whole truth about the fire, and you don't know anything about the fire?

A. No, sir, I do not.

Q. Okay. I thought of something a while ago that I didn't tell you before. The knobs on the stove, the kitchen stove—remember I asked you if the stove worked?

A. Uh-huh.

Q. Two of the knobs on the kitchen stove were turned to the on position. Gas was still coming out. It wasn't coming out then. Obviously, the fire department turned off the gas, or the gas would have been coming out had the gas been turned on.

A. The point that I came in the house, I didn't smell it. I have come home before—

Q. Uh-huh.

A. —like I said. Bill would leave a burner on or—

Q. You didn't turn the burners on?

A. No.

Q. Okay.

A. No. And I've—he's done that before, but it's like—and then—because they don't have pilot lights, you sometimes just forget to light [232] them. Or in Bill's case, sometimes he would go to cook something and forget to cook it, and you would see him light the fire, and it would just be sitting there burning.

Q. Okay.

A. If gas was still coming out, it looks like that would have—I don't know.

Q. You'll have to talk about the fire stuff with the fire department, because I—

A. Yeah, I can't even—I can't even speculate. I can tell you about electricity. I can't tell you—I can tell you anything you need to know about electricity, but I can't tell you anything about—

Q. —anything about gas or fire.

A. Well—

Q. I mean, if you put the two together, you're going to get a big boom.

A. I know natural gas will give you a really terrible headache—

Q. Uh-huh.

A. —and make you feel like you've got the flu. Also, I know it will blow up if there's enough of it, but it takes quite a lot. And Bill's house, he had—at least one window was broken out in the [233] back anyway, and we had a—we had a poster over it. It would almost be impossible to—you know, to be completely unventilated, because that was a—on the kitchen door back there, there was one pane of glass that was broken that we suspected some neighborhood kids did it one time and—when we had a Roadhouse monthly search dinner over it (indistinguishable).

Q. Uh-huh. Okay. Let me go print this up, let you read it, make sure that's what you want to say. We're pretty close to being done. I'll be right back.

(Brief Recess)

Q. (By Mr. Gilcrest) (22:48:31) I want you to read this. This is obviously not word for word as you were talking to me, because I can't type that fast. I'm not a dictator. So it's taken from what you told me. If there's anything in here that is not true or not correct or I put it down wrong, tell me and we'll change it, okay? Read it from the very top, okay?

A. Do you see one thing? I called him Bill more often than I called him Cato. That was an occasional . . .

[234] Q. Okay. Well—

A. When I was around people that called him Cato, I called him Cato. When I was around people that called him Bill, I called him Bill.

Q. And I changed it about halfway through and started calling him Bill also, as you did. Did you start from the top?

A. Uh-huh.

Q. Okay. You read all these warnings?

A. Uh-huh.

Q. The same thing I told you before?

A. Uh-huh.

Q. All right. Don't (inaudible) me off for spelling or anything. Is there something there you don't understand?

A. No.

Q. Okay.

A. It's quite all right.

Q. Okay.

(Brief Interruption)

UNIDENTIFIED SPEAKER: Yeah. As soon as he gets through reading that—

MR. GILCREST: Okay.

UNIDENTIFIED SPEAKER: —just give me [235] a holler.

MR. GILCREST: Thank you.

THE WITNESS: I lowered the my shoulder.

MR. GILCREST: I think you told me that.

THE WITNESS: I lowered the my.

MR. GILCREST: Oh, is it a typographical error?

THE WITNESS: When that happened, I lowered the my.

MR. GILCREST: The my.

THE WITNESS: I lowered my shoulder.

MR. GILCREST: Yeah, let me just put a line through that. There we go.

THE WITNESS: You know, I know this sounds like a chicken shit thing to say, but I didn't go over there intending to harm Bill. I didn't go over there intending to body block either.

MR. GILCREST: Okay.

THE WITNESS: He literally just kind of exploded and came at me. I think that I—that I did not go there probably—not intending to harm Bill probably expresses that enough. Yeah.

MR. GILCREST: Okay.

[236] THE WITNESS: But it was—it was—this is a shitty word. It was actually a self-protection thing almost, and it was also a reflex.

MR. GILCREST: Okay.

THE WITNESS: You know, I don't know if that should be on there or not.

MR. GILCREST: It's your statement. You tell me what you want on there.

THE WITNESS: Okay. I wanted to add Bill was acting—and that I didn't go over there intending to harm Bill. And, actually, it was a protective reflex. I don't know how to say that without sounding stupid.

MR. GILCREST: That's the way I'll put it if that's what you want to do.

THE WITNESS: I don't want to say self—well, I do want to say self-defense, but it wasn't like—

MR. GILCREST: Bill was not trying to—to harm you?

THE WITNESS: He was just—he wasn't just—I—and I was not trying to harm him. I was just trying to protect me. You know, I—I never touched him with fists.

[237] MR. GILCREST: Okay.

THE WITNESS: I didn't.

MR. GILCREST: So you want to add at the bottom it was—

THE WITNESS: It was—it was a—

MR. GILCREST: It was a self-protective reflex?

THE WITNESS: Yes. It was a—I don't know. If somebody comes at you, what do you do?

MR. GILCREST: Probably the same thing.

THE WITNESS: And like I say, I have moved the truck before, because he—a lot of times because if you don't, he'll get a spare set of keys and drive anyway.

MR. GILCREST: Okay.

THE WITNESS: I don't know—I don't think that's necessary, but . . .

MR. GILCREST: I'll just add, "I took the keys when I left. I drove Bill's truck down the street and parked it, as I've done before."

THE WITNESS: Yeah, because if you—you know, if—

MR. GILCREST: Is that what you want to say?

[238] THE WITNESS: Not really. I don't know.

MR. GILCREST: Is this okay this way, or do you want to add something?

THE WITNESS: You know, without being—or, he wasn't—he wasn't, I wouldn't imagine, in any shape to be driving. That's just good enough. I mean, just so he would not get in it and drive it. Potentially that's what it is. But he—if I took his keys, it wouldn't do any good.

MR. GILCREST: Okay. Let me go—let me go add this part here and get this "the" out—

THE WITNESS: Okay.

MR. GILCREST: —on this page. While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or, anything else. They're just going to witness you sign this statement, okay? You can do that on these two pages, and I'll go change this, okay?

THE WITNESS: All right.

MR. ROACH: Jane, Allen, why don't you come on in. You just have to witness him sign this.

FEMALE SPEAKER: Okay.

MR. ROACH: I need you to go ahead and [239] sign it right there and there. That's where it says person making the statement. I need you to sign your name there and there.

FEMALE SPEAKER: Okay.

MR. ROACH: And all you're signing is that you witnessed Bill sign his name on these pages, and I believe the detective is going to make some revisions on that other page, so we can sign that, so I need you two just to stand by, and hopefully in no longer than 45 seconds you can get back to work.

THE WITNESS: It was just a typo, and then I just wanted to add one thing.

MR. ROACH: I understand. You got a right to read it and make whatever changes you feel need to be made.

THE WITNESS: He did a pretty good job.

FEMALE SPEAKER: Okay. Sign one more place, then.

MR. ROACH: Well, if you'll hold tight.

THE WITNESS: I think he had like three words on the end and changed one word on one line. (22:57:59) He had to change one word on one line.

FEMALE SPEAKER: Okay.

[240] MR. REED: And then get it printed out on the printer.

FEMALE WITNESS: Okay.

MR. REED: Do you—you want anything more?

THE WITNESS: I could use something, I guess. I'm—I didn't eat tonight. I flew—I came straight here from New York. Then we had a meeting. So I guess could I have a Coke or something?

MR. REED: Is that what—you want a Coke or coffee?

THE WITNESS: No coffee.

MR. REED: No coffee.

THE WITNESS: I have high blood pressure. I don't even need the Coke actually, but I need some kind of sugar or something at this point, so . . .

MR. REED: Well, do you want a candy bar instead?

THE WITNESS: And some water maybe. Would that be possible?

MR. REED: Water and a candy bar.

THE WITNESS: Thank you.

MR. REED: All right. Because it [241] didn't sound like you wanted a Coke really that much.

THE WITNESS: (Inaudible) and since I'm not going to be allowed to take my normal medication tonight since I don't have it with me, you know.

MR. REED: Right. Why don't we finish this up here, and I'll go out there since he's not in the room.

THE WITNESS: Okay.

MR. REED: All right?

THE WITNESS: Fine. You guys have been great. Thanks.

MR. REED: No problem.

THE WITNESS: Just, you know, it's a weird feeling, but it feels good—

MR. REED: Getting it off your chest?

THE WITNESS: (Nods affirmatively).

MR. REED: I know the feeling well getting things off my chest.

THE WITNESS: I mean, I never meant to hurt this guy. I went over there to take him a six-pack of beer and just part company, because we already had actually. We just never got to sit and talk about a couple of things. Just can't. (Inaudible).

MR. GILCREST: (23:00:01) Okay. Just [242] look it over and I added this that we added here and took out the

goof that I made at the top, and that's all the changes I made. Can I get one of you-all to—

THE WITNESS: I didn't realize this was the word I used.

MR. GILCREST: Did I make another goof?

THE WITNESS: No. I—I might have done it, but . . .

MR. GILCREST: Just put the date and time below the signatures.

THE WITNESS: (23:00:36) (Inaudible) is a little—that's probably a weak word.

MR. GILCREST: Somewhat.

THE WITNESS: Yeah.

MR. GILCREST: He was out of control.

THE WITNESS: Yeah. He—I don't know if that should be—do you think I should change that, because he was?

MR. GILCREST: Don't ask me what I think. It's your statement, okay? If you want me to scratch it out, we'll just put a line through it, and let you initial it and just scratch out that word.

THE WITNESS: Yeah.

[243] MR. GILCREST: Okay.

THE WITNESS: Yeah, that's fine. That would work. Thank you.

MR. GILCREST: No problem.

THE WITNESS: I missed dinner—lunch today getting here on time. And I—

MR. GILCREST: Yeah, I know. I know. You had to buy a train ticket and everything.

THE WITNESS: Well, I don't—

MR. GILCREST: What I want you to do is while these folks are watching, I want you to initial out beside this line for this scratch out.

THE WITNESS: Okay.

MR. GILCREST: And then just go ahead and sign. This one is trash. Well, you signed in my spot.

THE WITNESS: Oh, I'm sorry.

MR. GILCREST: But that's okay.

THE WITNESS: I'm sorry.

MR. GILCREST: Because, see, I had already signed it on those others. Now, put your initials right there. See, we both made a goof.

THE WITNESS: (Complies.)

MR. GILCREST: There we go. Okay.

[244] FEMALE WITNESS: Okay. Now, do I put the date and time down at the bottom here.

MR. GILCREST: Please do.

FEMALE WITNESS: It's a good thing I could remember today's date.

MR. REED: It's two days from Halloween. How could you forget?

FEMALE WITNESS: Well, you know how I remembered? Yesterday, as I was going to the store, I thought . . .

MR. REED: Thanks, guys.

MR. GILCREST: Thank you-all very much. Okay. Enjoy your candy bar and water there, and I'm going to go take care of a little business, and we'll be back with you and get you—get you put up for the night.

THE WITNESS: Okay.

MR. GILCREST: Okay? All right.

THE WITNESS: Listen, man, thank you.

MR. GILCREST: Okay. Well, you know, good luck to you. We'll be talking with you some more, okay? They're going to take a picture of you here just for file purposes.

[245] MR. REED: Bill, I'm Detective Reed with Montgomery County Police, okay? I'm going to process you on fugitive injustice charges, okay? Those credit card warrants, okay? So we've got to do some processing work. What I want to do now is just take some Polaroid pictures of you.

THE WITNESS: Okay.

MR. REED: Okay? Why don't you—

THE WITNESS: Okay. It doesn't matter. If you want to go ahead and take the pictures first, I'll—

MR. REED: Huh?

THE WITNESS: If you want to go ahead and take the pictures first.

MR. REED: Okay. Fine. Why don't you stand right there. We'll take a number of them, so just. Okay. Why don't you do me a favor. Put your glasses back on. Just look straight ahead.

THE WITNESS: I think I'm kind of swaying a little bit.

MR. REED: That's okay. Just look straight ahead.

THE WITNESS: These are just reading glasses. I hardly ever have them on unless I can't [246] read.

MR. REED: I normally don't use this camera, because it's not working too well. Why don't you stand over here so I can get some faraway shots of you. Dang. I think they need to give me another one. I want you to put your glasses back on. I think that's it. Thank you. You can go ahead and have a seat. You good to go? You okay now?

THE WITNESS: Helped a lot. Thank you

MR. REED: All right. Why don't we get this out of the way. Go ahead and finish that while I—I've got to do one other thing.

(Videotape Concluded)

(3)

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IN THE

Supreme Court of the United States

WILLIAM ETHRIDGE HILL, JR.,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Judicial District

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Respondent does not dispute that *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), altered the way courts must analyze the admissibility of warned confessions obtained on the heels of an earlier, unwarned confession. Br. in Opp. 3. Respondent concedes that applying the factors identified by the plurality in *Seibert* to petitioner's interrogation "*would* indeed lead one to conclude that the belated written *Miranda* warnings *were ineffective*." Br. in Opp. 5 (emphasis added). And respondent makes little effort to dispute that the approach in Justice Kennedy's *Seibert* concurrence would require a fundamentally different analysis than that employed by the courts below. See Pet. 25-27; pp. 5-6, *infra*.

Instead, respondent attempts to distinguish *Seibert* on novel grounds that have no basis in any of the *Seibert* opinions, that contradict the *Miranda* requirements that *Seibert* implements, and that rest on questionable inferences drawn from disputed facts. Consequently, the effort merely underscores the need for the Court to grant the petition, vacate the judgment below, and remand for reconsideration (GVR) in light of *Seibert*. As the Court has made clear, GVR is appropriate in cases where an intervening decision of the Court bears strongly on and has a reasonable likelihood of affecting the decision below. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). That is precisely the case here.

I. The Two-Step Interrogation Technique Or Its Constitutional Equivalent Was Used

A. Respondent does not deny that, before petitioner gave his oral statement during "heavy duty" interrogation, the officers failed to warn him of the adversarial consequences of the statement—*i.e.*, that the statement could be used against him. Pet. 17; Pet. App. 44a. Respondent likewise concedes that the failure rendered petitioner's oral statement inadmissible, because the warning was "required to offset the potential coercive effects of custodial interrogation," Br. in Opp. 5, including the concededly aggressive tactics being used with petitioner. It "is only through an awareness of" the adversarial consequences "that there can be any assurance of

real understanding and intelligent exercise of the privilege." *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966).

Consequently, as respondent concedes, "the critical issue" is whether the later, written warning would have conveyed to "a 'reasonable person' in [petitioner's] shoes * * * that he had a real choice regarding signing the typewritten" statement, which did no more than memorialize the extensive oral statements petitioner already had given. Br. in Opp. 7. Far from curing the "ineffective[ness]" of the prior warnings, *ibid.*, the written *Miranda* warnings merely replicated and reinforced the constitutional defect. Officer Gilchrest incorrectly told petitioner that the written warnings were "[t]he same thing I told you before," 5/16/00 Hr'g Def. Exh. 2 at 234, *i.e.*, the same incomplete warnings given four hours earlier that nowhere advised petitioner that the statement could be used against him, *id.* at 48-49. That alone carried the constitutional defect that infected the earlier warnings into the later ones.

More important, *Seibert* makes it clear that the belated administration of a warning regarding adversarial consequences, *after* the individual has already spoken, *reinforces* the impression that invoking the right to silence is futile. As the plurality opinion explains, it leads to the "entirely reasonable inference that what [the individual] has just said" before receiving the warning "*will* be used" against him, making later silence "of no avail." 124 S. Ct. at 2611 (emphasis added); Pet. 18. That inference is particularly strong here. Petitioner was not asked to make additional statements. He instead was asked to sign a document memorializing the extensive oral statements already made in front of multiple officers. Petitioner thus had every reason to believe that invoking the right to remain silent would be a meaningless act.

Most important, Gilchrest's misrepresentation makes petitioner's case even stronger than *Seibert's*. By telling petitioner that the complete written warnings were the "same thing" given earlier, Gilchrest reinforced the danger articulated by the *Seibert* plurality, effectively advising petitioner that he had no constitutional objection to the use of his prior

oral statement. Here, more so than in *Seibert*, Gilchrest's prior reference to his earlier warnings was an "implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. [That] implicit suggestion was false." 124 S. Ct. at 2615 (Kennedy, J., concurring). Thus, the police deprived petitioner of information critical to petitioner's ability to make an informed waiver of his *Miranda* rights.[1] Respondent bears the burden of proving a knowing and voluntary waiver. That burden has not been met.

B. Respondent nonetheless asserts that the provision of *incomplete* warnings before petitioner made his oral statement somehow rendered the later warnings "effective as a matter of law." Br. in Opp. 5. According to respondent, "the prior warnings * * * serve[d] as a catalyst for both" petitioner's "appreciation of his current situation and the subsequent understanding of the later warnings." *Ibid.* Even if that novel "catalyst" theory had some basis in *Miranda* or *Seibert*—and it does not—its application here proves the ineffectiveness of the written warnings on which respondent seeks to rely. Here, the belated mention of adversarial consequences would not "convey a message that [petitioner] retained a choice about," *Seibert*, 124 S. Ct. at 2613, confirming his prior statement, because it supports the opposite conclusion—the "entirely reasonable inference that" the identical oral statement petitioner had already given without proper warnings in front of multiple officers "will be used, with subsequent silence being of no avail." *Id.* at 2611.

Respondent's novel "catalyst" theory, moreover, rests on the false premise that the required warning of adversarial consequences is an inconsequential tag-along to the core right to remain silent that, according to respondent, the warning merely "serve[s] to support." Br. in Opp. 11, 12. *Miranda*

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[1] Respondent has no answer to this point. Instead, respondent mischaracterizes the *Seibert* plurality opinion as hinging on "voluntariness," Br. in Opp. 4, despite the fact that the opinion expressly disavows any assessment of the "actual voluntariness of [Seibert's] statement." 124 S. Ct. at 2613 n.8.

says the opposite, explaining that the warning is necessary to give teeth to the right to remain silent:

> [The] warning is needed in order to make [a suspect] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

384 U.S. at 469; accord *Seibert*, 124 S. Ct. at 2611 (plurality opinion). The adversarial consequences warning is "an absolute prerequisite to interrogation." *Miranda*, 384 U.S. at 471. Respondent thus seeks to limit *Seibert*'s construction of *Miranda* using a theory that *Miranda* itself rejects.

Detective Gilchrest and his colleagues in this case, moreover, went to lengths to ensure that petitioner would *not* have concerns about potential adversarial consequences. Gilchrest and police officer James Drewry both testified that the camera videotaping the interview was hidden from petitioner to ensure he would not "worry" or "be concerned" that the tape "might be *used against [him]* in some court proceeding." Pet. 24-25 (emphasis added) (quoting 5/16/00 Hr'g Tr. 26-27, 182). So that petitioner would not worry about adversarial consequences, Gilchrest told petitioner that the focus of the investigation was on an accidental death, 5/16/00 Hr'g Tr. 152; that he wanted to discuss petitioner's "relationship with Bill Allen and everything that led up to his death," 5/16/00 Hr'g Def. Exh. 2 at 4; and repeatedly expressed sympathy for petitioner, urging him "we're just trying to get you to help yourself." *Id.* at 207; see also *id.* at 142 ("A lot of what I'm [Gilchrest] going to be able to do from this point on, almost everything to help you out, depends on what you tell me right now."); *id.* at 162-63 ("If I [Gilchrest] had walked in this room and you had said * * * It was a terrible accident, I didn't mean for it to happen, I got panicked, left, you know, by God, we can work with that.").

C. Respondent also intermittently suggests that *Seibert* is inapplicable because Officer Gilchrest did not intentionally omit the warning about adversarial consequences. Br. in Opp. 12, 13, 16-17; see 124 S. Ct. at 2616 (Kennedy, J., concurring). But eight members of this Court in *Seibert* concluded that the officer's subjective intent does not control. 124 S. Ct. at 2612 n.6 (plurality opinion); *id.* at 2618 (O'Connor, J., dissenting). Even if one were to assume that Officer Gilchrest's subjective intent controls here, whether Officer Gilchrest *intended* to omit the warnings is precisely the sort of *factual* issue that must be resolved by the state courts in the first instance. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995) ("remand[ing]" case "to allow the state courts to make any necessary findings of fact and to make the determination * * * in the first instance").

As made clear in the petition, see pp. 24-25, and above, see pp. 4-5, *supra*, there is abundant evidence—including the strenuous efforts to keep petitioner from "worry[ing]" or "be[ing] concerned" that his statements "might be used against him later on"—from which a reasonable trier-of-fact could infer the omission was intentional. Cf. *United States* v. *Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (relying on trial court's finding that "the method and timing of the two interrogations," standing alone, "establish intentional, calculated conduct by the police"). The federal courts of appeals in similar circumstances have declined to make factual findings regarding intent and instead have remanded on appeal for factfinding by the trial court. See *United States* v. *Stewart*, 388 F.3d 1079, 1091 (7th Cir. 2004).[2] *A fortiori* this Court

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[2] Where lower courts have found no evidence of the "two-step" strategy on a cold record, the first step has—in contrast with the extensive interrogation here—consisted of only a few spontaneous questions. See *United States* v. *Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (single question without requestioning until the following day); *United States* v. *Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2004) (initial conversation at the suspect's home "relatively brief" and included only a few topics eventually covered in the interrogation); *United States* v. *Johnson*, 354 F. Supp. 2d

should not make factual findings about a *state* officer's intent on a petition for a writ of certiorari to a *state* court. And respondent does not dispute that, if the police conduct was deliberate, *Seibert* applies.

Respondent, moreover, ignores the fact that the reasoning of Justice Kennedy's concurring opinion does not necessarily extend to the type of police conduct at issue here. See Pet. 25-27. That opinion excuses the failure to render *Miranda* warnings in the first instance where there is a legitimate excuse for doing so, such as where the officer makes a mistake because of the exigencies of the investigation, or stumbles on an ambiguity (such as the definition of "custody"). The opinion thus seeks to balance the goals of *Miranda* with countervailing "legitimate interests" implicated by *Miranda*'s application in the real world. 124 S. Ct. at 2614. Here, there are no such countervailing interests. Despite the participation of three experienced law enforcement agents in an elaborately planned and intensive interrogation with plenty of opportunity for the administration of timely and complete *Miranda* rights, the officers without objective excuse simply failed to meet their constitutional duty.

II. The Written Warning Did Not Function Effectively As *Miranda* Requires

Alternatively, respondent urges the Court to conclude that petitioner in fact understood his rights in light of "common sense," and his "experience dealing with police." Br. in Opp. 16, 18. But *Seibert* points in the opposite direction, as described above. Because Officer Gilchrest described the written warnings as the "same thing" petitioner was told before, the new warnings did nothing to cure the defects in the old ones. And because the belated warning about adversarial consequences supported an inference that the statement petitioner had already made would be used against him in any event, the warning could convince petitioner only that any

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904, 907 (W.D. Wis. 2005) ("The only question the officers posed * * * was whether there were drugs or guns in the apartment.").

refusal to sign was futile. Here, as in *Seibert*, the insertion of *Miranda* warnings "in the midst of a coordinated and continuing interrogation [was] likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Seibert*, 124 S. Ct. at 2611 (plurality opinion) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986)).

Respondent's assertion that petitioner could not "have thought his statements were nothing more than insignificant chatter in the interview room," Br. in Opp. 13, proves too much. The same thing could be said of any person subjected to intensive in-custody interrogation. This Court has not embraced the principle that a suspect should be deemed aware of (and able to exercise) his rights without being advised of them. For that reason, *Miranda* requires warnings to be given in every case. "[W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Miranda*, 384 U.S. at 469. Here, moreover, the officers used interrogation techniques—alternating between pressure and seduction—that present precisely the risk of coercion *Miranda* warnings are designed to redress.

Respondent likewise errs in claiming that petitioner must have understood his rights because, "for the first two-thirds of the interview," he "doggedly" denied that he had visited the victim. Br. in Opp. 14. It is utterly specious to suggest that every suspect who changes his story during an intense interrogation necessarily understands his *Miranda* rights. *Seibert*, moreover, analyzes whether a "reasonable person in the suspect's shoes" would have understood his rights *after* warnings have been administered. 124 S. Ct. at 2612-2613 (plurality opinion). It does not suggest that courts should speculate (based on ambiguous evidence) that an individual might have known his rights *before* being advised of them. The test is (as respondent admits) objective, not subjective. Br. in Opp. 5. If anything, here the fact that petitioner

accepted his interrogators' persistent representations that it would help him to admit having been at the crime scene demonstrates the importance of a timely adverse consequences warning as an "absolute prerequisite" to interrogation. See p. 4, *supra*.

Respondent's attempt to portray petitioner as someone with extensive "experience dealing with police," Br. in Opp. 16, is likewise unconvincing. This Court has squarely held that relying on a suspect's "prior law enforcement experience" is "improper when deciding when suspects should be advised of their *Miranda* rights" because that "inquiry turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation." *Yarborough* v. *Alvarado*, 124 S. Ct. 2140, 2152 (2004) (internal quotation marks omitted). Further, none of the incidents petitioner describes and respondent reprints, Br. in Opp. 8 11, involve petitioner having been read his *Miranda* rights; nor does respondent present any other evidence of petitioner's supposed experience. To the extent it is relevant, petitioner's rambling and naive presentation of his experiences merely underscores his vulnerability. Under the circumstances, the omitted warning about adversarial consequences was "the most critical"; the courts "can not be so presumptuous as to think that [the adversarial consequences warning] would be common knowledge to laymen." *United States* v. *Tillman*, 963 F.2d 137, 141 (6th Cir. 1992).[3]

Ultimately, respondent's argument that petitioner should have known the consequences of talking to police and its novel

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[3] The State's suggestion that *Miranda's* authorization of the use of "alternative[]" warnings permits the *omission* of particular warnings where a suspect may already know his rights, finds no support in this Court's precedents. Br. in Opp. 11. *Miranda* itself makes clear that any alternative formulation must be "a *fully effective equivalent*," not a partial warning that omits important elements. 384 U.S. at 476 (emphasis added); *Duckworth* v. *Egan*, 492 U.S. 195, 203 (1988) ("The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" (quoting *California* v. *Prysock*, 453 U.S. 355, 361 (1981) (per curiam)).

"catalyst" theory are insufficient to meet its burden of showing that petitioner "knowingly and intelligently" waived his rights. *Miranda*, 384 U.S. at 475. Any doubt regarding whether respondent has met its burden in light of the intervening decision in *Seibert* only reinforces the need to GVR.

Finally, respondent asserts the "formality" of the written statement "sever[ed]" it from the first-half of the interrogation. Br. in Opp. 17. But that assertion contradicts respondent's concession that "[a]pplication of" the five factors announced by the *Seibert* plurality to the "two 'rounds' of questioning" that occurred here "would indeed lead one to conclude that the written *Miranda* warnings were ineffective." Br. in Opp. 5. Surely if the wholly overlapping content of the two phases of interrogation were such that petitioner's review of the written statement could not be viewed as a new experience, the written statement could not have "sever[ed]" the second phase of the interrogation from the first.

Detective Gilchrest, moreover, expressly linked the two by introducing the typewritten statement to petitioner as the written version of the oral statement he had already given. 5/16/00 Hr'g Def. Exh. 2 at 233. Petitioner may have paid "attention to detail" when correcting the document. Br. in Opp. 17. But that hardly proves that petitioner, having already been told and having repeatedly been committed to the same story by two officers, should have understood that he had a real choice to make before signing the written version of his statement. See pp. 2-3, *supra*. Nor did the officers seek to cure the misapprehension created by their own conduct by, for example, informing petitioner that his prior oral statement was inadmissible. See *Seibert*, 124 S. Ct. at 2612 n.7 (plurality opinion); *id.* 2616 (Kennedy, J., concurring).[4]

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[4] The State notes that Gilchrest permitted petitioner to call his mother before retrieving his laptop and reducing Hill's oral statement to writing. Br. in Opp. 17 (citing "Trans.-209"). But unwarned questioning resumed immediately after that short break, and it was not until one hour later that petitioner was presented with the printed *Miranda* warnings and the written statement for signature. 5/16/00 Hr'g Def.

To the contrary, the written warnings, presented to petitioner together with a typed version of the oral statement petitioner had already made and repeated, could not have "convey[ed] a message that [petitioner] retained a choice about continuing to talk." *Seibert*, 124 S. Ct. at 2613 (plurality opinion). In fact, there was no *talking* left for petitioner to do. Petitioner "did not make a second statement after he finally received his *Miranda* warnings; he simply signed the written statement that he had dictated to [Gilchrest] before he was warned." *Jones* v. *State*, 119 S.W.3d 766, 775 (Tex. Crim. App. 2003). The belated warnings did not create "a new and distinct experience" for petitioner. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). Rather, the warnings were presented as the "same thing" petitioner had heard before; the statement was merely the written version of what he had already repeatedly said; and any refusal to sign would have seemed a wholly futile act given that he had made the same statement repeatedly before multiple police officers. Under the circumstances, deeming the "statement admissible by virtue of the late admonishment of the required warnings would" not merely "undermine the spirit and intent of *Miranda*," *Jones*, 119 S.W.3d at 775, but the content of *Seibert* as well.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the Texas Court of Appeals should be vacated, and the case remanded to that court for further consideration in light of this Court's intervening decision in *Seibert*. Alternatively, this Court should grant the petition and set the case for argument on the merits.

Exh. 2 at 209-234. The short break, immediately followed by more unwarned questioning, cannot by any stretch have suggested "that the interrogation ha[d] taken a new turn." *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

[5] Respondent also musters no response to petitioner's point that the written statement should have been excluded even under the standards of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Pet. 21-22.

Respectfully submitted,

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